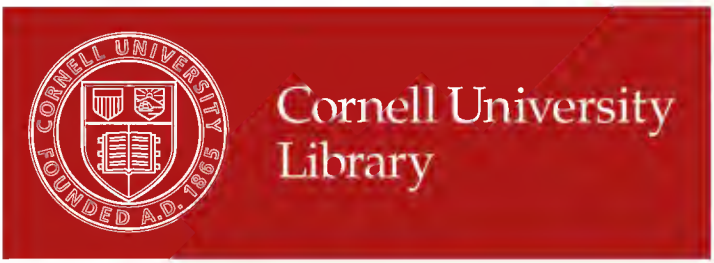

CASES ON SALES

OF

PERSONAL PROPERTY

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PART I.

SALES, ESSENTIALS AND DISTINCTIONS.

CUNNINGHAM v. ASHBROOK ET AL.[1]

(20 Missouri, 553.—1855.)

ACTION to recover the price of a drove of hogs.

Defendants, slaughterers and packers, agreed with McAllister and with Whitaker, also packers, that each should have one-third of all hogs slaughtered. Defendants were to do the buying and slaughtering. An agent employed to buy, some-

[1] SALE DEFINED.—"Sale, or *exchange*, is a transmutation of property from one man to another in consideration of some price or recompense in value: for there is no sale without a recompense: there must be *quid pro quo*. If it be a commutation of goods for goods, it is more properly an *exchange*; but if it be a transferring of goods for money, it is called a sale."—2 Blackstone's Com. 446.

"A sale is a contract for the transfer of property from one person to another, for a valuable consideration."—2 Kent's Com. 468.

"A sale is a transfer of the absolute title to property for a certain agreed price. It is a contract between two parties, one of whom acquires thereby a property in the thing sold, and the other parts with it for a valuable consideration. If the property in any commodity be voluntarily transferred without a valuable consideration, it is a gift; if one article be exchanged for another, it is a barter; but a sale takes place only when there is a transfer of the title to property for a price."—Story on Sales, § 1.

"By the common law a sale of personal property is usually termed a 'bargain and sale of goods.' It may be defined to be a transfer of the *absolute or general* property in a thing for a price in money."—Benjamin on Sales, § 1.

"*Sale* is a word of precise legal import both at law and in equity. It means at all times, a contract between parties, to give and to pass rights of property for money,—which the buyer pays or promises to pay to the seller for the thing bought and sold."—*Williamson* v. *Berry*, 8 How. 495, 544.

In order to include *executory* as well as *executed* sales, and to exclude other transactions of seemingly similar character, a sale may be defined to be a contract for the transfer of the absolute property in personalty for a price in money, or in money's worth.

times bought for McAllister, sometimes for Whitaker, but principally for defendants. The agent, not saying for whom he was buying, engaged 148 hogs of the plaintiff, at $4.15 per cwt., net weight, to be delivered at defendants' slaughter-house, to be killed and weighed by the buyer. The hogs were taken there and killed, and defendants told plaintiff to call next day at McAllister's packing house, see the hogs weighed, and get his money. That night the slaughter-house with the hogs was destroyed by fire. Plaintiff was nonsuited, and sued out a writ of error.

LEONARD, J. The only things essential to a valid sale of personal property at common law were, a proper subject, a price, and the consent of the contracting parties, and when these concurred, the sale was complete, and the title passed without anything more. (2 Black Com. 447; *Bloxom* v. *Sanders*, 4 Barn. & Cres. 941.) The term sale, however, in its largest sense, may include every agreement for the transferring of ownership, whether immediate or to be completed afterwards, and goods, in reference to the disposition of them by sale, may be considered as existing separately and ready for immediate delivery, or as a part of a larger mass from which they must be separated by counting, weighing or measuring, or as goods to be hereafter procured and supplied to the buyer, or to be manufactured for his use. Goods of the first sort are the only proper subjects of a common law sale, which is strictly a transaction operating as a present transfer of ownership, and does not include executory contracts for the future sale and delivery of personal property, although there are some apparently anomalous cases in our books in which transactions in reference to goods to be separated from a mass seem to have been treated, where there had been a constructive delivery, as valid sales, producing a present change of property.

The general rule, however, is otherwise, and all the different sorts of goods to which we have referred, except the first, are, under our law, the proper subjects only of executory agreements—contracts for the future sale and delivery of them.

The Roman law, however, it is said, dealt differently with this subject. In that system of jurisprudence (Bell on Contract of Sale, 9,) "a sale was not an immediate transmutation of property, but a contract of mutual and personal engagements

for the transference of the thing on the one hand and the payment of the price on the other, without regard to the time of performance on either part, that being left to be regulated by the agreement of the parties, the seller being bound to deliver the thing in property to the buyer at the time agreed on, and the buyer to pay the price in the manner settled between them. The distinction was carefully observed between the direct right of property (*jus in re*) conferred by delivery, and the indirect right (*jus ad rem*) to demand of the seller delivery of the thing sold. There thus arose out of the contract the double relation of debtor and creditor, as to the thing sold and the price to be paid for it. Corresponding with these relations, two actions were given, both personal and direct; one for the thing sold, the other for the price due. The claim for the price being absolute on delivery or tender of the thing and the demand for the thing conditional, provided it had not in the meantime perished without fault of the seller." Thus it is seen, a Roman sale was applicable to all the possible circumstances in which goods to be transferred could be found, and the respective engagements of buyer and seller (under such a transaction,) were specifically enforced by the appropriate actions.

Although at common law consent alone was sufficient to constitute a valid sale, the statute of frauds has now intervened and other formalities are prescribed, which must be observed, or what was before a valid transfer of property is now of no validity. The statute, beginning where the common law stopped, requires some one of these solemnities to be added to the transaction before it shall be considered as complete, so as to affect a change of ownership; and the matter here relied upon, as the statute evidence of the completion of the contract, was the change of possession. This provision of the statute implies, it is said, a delivery of the thing sold on the part of the debtor, and an acceptance of it by the buyer, with an intention on the one side to part with, and on the other to accept the ownership of it; and it is not enough that the mere natural, actual, corporeal possession should be changed, but there must be a change of the civil possession, which is a holding of the thing with the design of keeping it as owner; and this brings us to an examination of the instruction complained of, and which resulted in nonsuiting the plaintiff.

The proof given shows (or, at least, conduces to show, which,

for the present purpose, is the same thing,) that the thing sold had been delivered in point of fact to the buyer, and the true question in the cause, (indeed the only one that could be raised,) was, whether this change of actual possession was also a change of the civil possession; or, in other words, whether the hogs were delivered and received by the parties respectively, with the intention of changing the ownership. If the facts were so, the sale was perfect, the title passed, and the loss fell upon the new owner.

It is to be remarked that this is the sale of a specific commodity, the whole drove, and not of a part, to be ascertained by counting out the required number, and therefore, the title passed as soon as the bargain was completed by the delivery. It was not a transaction in relation to the sale of part of a mass, which could not take effect as a present sale, immediately changing the property, until the separation was actually made; and it is possible some confusion may have arisen here by not clearly distinguishing between the sale of a specific commodity, clearly separated and distinguished from all others, as a specific drove of stock, and of an indefinite commodity, as a hundred barrels of corn out of the party's crib, or a hundred mules out of his drove, when the seller is bound to separate and identify the particular part sold, before it can pass in property to the purchaser.

Nor is their any objection to the validity of this transaction as a present sale, growing out of the supposed uncertainty as to the price. Although there is no sale until the price is settled between the parties, yet it is settled, within the meaning of this rule, when the terms of it are so fixed that the sum to be paid can be ascertained without further reference to the parties themselves; and, indeed, by the common law, the price is fixed within this rule, even when it appears that the parties have agreed that it shall be the reasonable worth of the thing sold, leaving it to the tribunals to ascertain the amount, if they cannot agree upon it themselves. (Bell on Sales, 18–20; *Acebol* v. *Levy*, 10 Bing. 382.)

This, then, was a present agreement between these parties for the sale of a specific commodity for a price settled between them, so as to be capable of future ascertainment, without further reference to themselves, and, we repeat, immediately passed the title to the buyer, if the ceremony of delivery required by the stat-

ute of frauds was complied with, and there having been a delivery in fact, the whole question was, as before remarked, with what intention that delivery was made, whether merely that the hogs might be weighed, neither party being bound in the meantime by what had passed between them, or as the formal completion of the bargain to bind the parties and vest the ownership in the purchaser.

We come now to an examination of the instruction complained of, the substance of which is, that if the hogs were sold by net weight, to be ascertained by weighing after they were slaughtered and cleaned, then the presumption that the sale was completed by the delivery is met and repelled, and the loss falls on the plaintiff, as owner, unless he shows that the parties intended the sale to be complete upon the delivery. The jury would, no doubt, have so understood the direction, when they came to apply it to the case, and such, too, we suppose, was the meaning of the court; but we do not concur in this view of the law. Certainly, this circumstance was proper for the jury upon the question of the intention of the parties in changing the actual possession, and might have afforded a very proper topic of comment to counsel, in arguing the question of fact before them; but we do not think any well considered case has gone the length of declaring that it changed the strong natural presumption to be derived from the actual delivery of the property, and imposed upon the other party the necessity of showing that "the parties intended the sale to be absolute and complete before the weighing," and we feel well assured that there is no principle upon which this position can be maintained. We find it frequently repeated in the books, that when anything remains to be done by the seller, such as counting, weighing or measuring, the title does not pass; and this is certainly correct, when this operation is necessary in order to separate the goods from a larger mass, of which they are part; but that is not this case, and we think that by keeping the distinction between a specific and an indefinite commodity in view, most of the cases upon this subject can be explained, and their apparent conflict reconciled. It is also certainly true that, in determining the question as to the purpose of the parties in changing the actual possession, the fact that the price is to be subsequently ascertained by reference to the net weight, and then paid, is proper to go to the jury; but possession is so much of the essence of property, as it is that

alone which enables us to enjoy a thing as property, and the natural connection between property and possession, especially in movables, is so strong, that the presumption arising from a change of actual possession, that it was intended also as a change of the property, is not, in our view, overcome, as a matter of law, by the fact here relied upon, that the thing bargained for was to be paid for by weight, to be ascertained after the delivery.

We shall content ourselves by a reference to a few cases which we consider directly in point, in support of the position we have taken. *Scott* v. *Wills*, 6 Watts & Serg. 368, was the case of the sale of a raft of lumber at twelve dollars per thousand feet, to be ascertained by measurement. There had been a delivery, and the raft being lost by a freshet, the question was, whether the property passed so as to cast the loss upon the buyer. The court below instructed the jury that "parties may make a sale of goods so as to pass the property by the actual delivery thereof, without first fixing the quantity upon which the price is to be computed," and the Supreme Court approved of the direction, Judge Gibson remarking, "that a sale is imperfect only when it is left open for the addition of terms necessary to complete it, or where it is defective in some indispensable ingredient, which cannot be supplied from extrinsic sources. But when possession is delivered pursuant to a contract which contains no provision for additional terms, the parties evince, in a way not to be mistaken, that they suppose the bargain to be consummated."

Macomber v. *Parker*, 13 Pick. Rep. 182, was a sale of a quantity of brick in a kiln at a certain rate per thousand, to be ascertained by counting, and the court, in delivering its opinion says: "It is true the bricks were to be counted, but that was to be done to enable the parties to come to a settlement of their accounts, and not for the purpose of completing the sale. Taking the whole of Hunting's testimony together, this we think is the reasonable inference to be drawn from it. If the bricks had been actually delivered, there could have been no question that the sale would have been complete, notwithstanding the bricks were to be afterwards counted. The general principle is, that when an operation of weight, measurement, counting or the like, remains to be performed in order to ascertain the price, the quantity or the particular commodity to be delivered, and to put it in a deliverable state, the contract is incomplete,

until such operation is performed. (Brown on Sales, 44.) But where the goods or commodities are actually delivered, that shows the intent of the parties to complete the sale by the delivery, and the weighing, or measuring or counting afterwards would not be considered as any part of the contract of sale, but would be taken to refer to the adjustment of the final settlement as to the price. The sale would be as complete as a sale upon credit before the actual payment of the price. Nothing can be found in any of the numerous cases on this point, which militates against this position."

The remarks of the same court in *Riddle* v. *Varnum*, 20 Pick. 283–4, to which we have been referred by the counsel for the respondents are not intended to conflict with what had been previously determined, but expressly affirm that decision.

It is true the court say that "the party affirming the sale must satisfy the jury that it was intended to be an absolute transfer, and all that remained to be done was merely for the purpose of ascertaining the price of the articles sold at the sale agreed upon." And of this there can be no doubt, but yet that is a matter for the jury, and it is not intimated in this case that when there is an actual delivery, the jury cannot be allowed to infer such intention without some additional evidence.

These questions generally arise when the thing sold has perished, and the contest is upon whom the loss shall fall, and it may not be improper here to remark that, notwithstanding the marked difference between a Roman and a common law sale, in other particulars, when a loss occurs, it falls upon the same person under either system. Under our law, the maxim is that the owner bears the loss, a rule, it would seem, of universal application, *res perit domino*. Under the Roman law, the debtor of a specific thing was not answerable for its loss, when it perished in his hands without fault, and when there had been a purchase of a specific commodity, although the property was not changed until delivery, the seller, by the bargain, became debtor to the buyer of the particular thing bought, and so not liable if it perished without fault.

We repeat what we have before said, it is a question for the jury. If the delivery were for the purpose of passing the property, it had that effect, although the price was to be afterwards ascertained and paid according to the net weight, and there is no rule of law that, under such circumstances, the presumption

arising from the delivery is met and repelled, and that other evidence becomes necessary in order to make out a *prima facie* case of a present sale. The seller has a right, notwithstanding the bargain, to retain his property till he is paid, unless he agrees to allow the purchaser a credit (the bargain for an immediate transfer of property implying a present payment of the price), and hence, when there is no understanding as to the time of payment other than what is implied in the postponement of it until the quantity of the thing sold is ascertained in the manner indicated in the contract, this circumstance is certainly entitled to consideration with the jury, in determining the character of the delivery, which, if intended to pass the thing in property, deprives the seller of his security upon it for the price, at the same time that it throws upon the buyer the future risk. The judgment is reversed, and the cause remanded.

DEXTER v. NORTON ET AL.[1]

(47 New York, 62.—1871.)

APPEAL from judgment of the General Term of the Supreme Court, affirming ruling of lower court, dismissing the complaint.

On October 5, 1865, defendants agreed to sell and deliver 607 bales of cotton to plaintiff. Prices were determined, and payment was to be made on delivery. Four hundred and sixty bales were delivered; 161 bales were destroyed by fire, without

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[1] Pothier, *Contrat de Vente*, No. 4, says: "There must be a thing sold, which forms the subject of the contract. If then, ignorant of the death of my horse, I sell it, there is no sale for want of a thing sold. For the same reason, if when we are together in Paris, I sell you my house at Orleans, both being ignorant that it has been wholly, or in great part, burnt down, the contract is null because the house, which was the subject of it, did not exist; the site and what is left of the house are not the subject of our bargain, but only the remainder of it."

In case of an attempted executed contract of sale, if the thing to be sold has ceased to exist at the time of the contract, no valid contract of sale results; in case of an executory contract of sale, if the thing to be sold has ceased to exist before the execution of the contract, the contract is discharged.

fault of defendants. Cotton subsequently rose in value. Plaintiff sues to recover damages for failure to deliver 161 bales.

CHURCH, Ch. J. The contract was for the sale and delivery of specific articles of personal property. Each bale sold was designated by a particular mark, and there is nothing in the case, to show that these marks were used merely to distinguish the general kind or quality of the article, but they seem to have been used to describe the particular bales of cotton then in possession of the defendant. Nor does it appear that there were other bales of cotton in the market of the same kind, and marked in the same way. The plaintiff would not have been obliged to accept any other cotton than the bales specified in the bought note.

The contract was executory, and various things remained to be done to the 161 bales in question by the sellers before delivery. The title, therefore, did not pass to the vendee, but remained in the vendor. (*Joice* v. *Adams*, 8 N. Y. 291.)

This action was brought by the purchaser against the vendor to recover damages for the non-delivery of the cotton, and the important and only question in the case is, whether upon an agreement for the sale and delivery of specific articles of personal property, under circumstances where the title to the property does not vest in the vendee, and the property is destroyed by an accidental fire before delivery without the fault of the seller, the latter is liable upon the contract for damages sustained by the purchaser.

The general rule on this subject is well established, that where the performance of a duty or charge created by law is prevented by inevitable accident without the fault of the party he will be excused, but where a person absolutely contracts to do a certain thing not impossible or unlawful at the time, he will not be excused from the obligations of the contract unless the performance is made unlawful, or is prevented by the other party.

Neither inevitable accident, nor even those events denominated acts of God will excuse him, and the reason given is that he might have provided against them by his contract. (*Paradine* v. *Tone*, Aleyn, 27; *Harmony* v. *Bingham*, 12 N. Y. 99; *Tompkins* v. *Dudley*, 25 N. Y. 272.)

But there are a variety of cases where the courts have implied a condition in the contract itself, the effect of which was to

relieve the party when the performance had, without his fault, become impossible; and the apparent confusion in the authorities, has grown out of the difficulty in determining in a given case whether the implication of a condition should be applied or not, and also in some cases in placing the decision upon a wrong basis. The relief afforded to the party in the cases referred to, is not based upon exceptions to the general rule, but upon the construction of the contract.

For instance, in the case of an absolute promise to marry, the death of either party discharges the contract, because it is inferred or presumed that the contract was made upon the condition that both parties should live.

So of a contract made by a painter to paint a picture, or an author to compose a work, or an apprentice to serve his master a specified number of years, or in any contract for personal services dependent upon the life of the individual making it, the contract is discharged upon the death of the party, in accordance with the condition of continued existence, raised by implication. (2 Smith's Leading Cases, 50.)

The same rule has been laid down as to property: "As if A. agrees to sell and deliver his horse Eclipse to B. on a fixed future day, and the horse die in the interval, the obligation is at an end." (Benjamin on Sales, 424.) In replevin for a horse, and judgment of *retorno habendo*, the death of the horse was held a good plea in an action upon the bond. (12 Wend. 589.) In *Taylor* v. *Caldwell*, 113 E. C. R. 824, A. agreed with B. to give him the use of a music hall on specified days, for the purpose of holding concerts, and before the time arrived the building was accidentally burned; held, that both parties were discharged from the contract. Blackburn, J., at the close of his opinion, lays down the rule as follows: "The principle seems to us to be, that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance, arising from the perishing of the person or thing, shall excuse the performance." And the reason given for the rule is, "because from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the particular person or thing."

In *School District No. 1* v. *Dauchy*, 25 Conn. 530, the defendant had agreed to build a schoolhouse by the first of May, and

had it nearly completed on the twenty-seventh of April, when it was struck by lightning and burned; and it was held, that he was liable in damages for the non-performance of the contract. But the court, while enforcing that general rule in a case of evident hardship, recognizes the rule of an implied condition in case of the destruction of the specific subject-matter of the contract; and this is the rule of the civil law. (Pothier on Contracts and Sale, art. 4, § 1, p. 31.) We were referred to no authority against this rule. But the learned counsel for the appellant, in his very able and forcible argument, insisted that the general rule should be applied in this case. While it is difficult to trace a clear distinction between this case and those where no condition has been implied, the tendency of the authorities, so far as they go, recognize such a distinction, and it is based upon the presumption that the parties contemplated the continued existence of the subject-matter of the contract.

The circumstances of this case are favorable to the plaintiff. The property was merchandise sold in the market. The defendant could, and from the usual course of business we may infer, did protect himself by insurance; but in establishing rules of liability in commercial transactions, it is far more important that they should be uniform and certain than it is to work out equity in a given case. There is no hardship in placing the parties (especially the buyer) in the position they were in before the contract was made. The buyer can only lose the profits of the purchase; the seller may lose the whole contract price, and if his liability for non-delivery should be established, the enhanced value of the property. After considerable reflection, I am of the opinion that the rule here indicated of an implied condition in case of the destruction of the property, bargained, without fault of the party will operate to carry out the intention of the parties under most circumstances, and will be more just than the contrary rule. The buyer can of course always protect himself against the effect of the implied condition, by a provision in the contract that the property shall be at the risk of the seller.

Upon the grounds upon which this rule is based of an implied condition, it can make no difference whether the property was destroyed by an inevitable accident, or by an act of God, the condition being that the property shall continue to exist. If we were creating an exception to the general rule of liability,

there would be force in the considerations urged upon the argument, to limit the exception, to cases where the property was destroyed by the act of God, upon grounds of public policy, but they are not material in adopting a rule for the construction of the contract so as to imply a condition that the property was to continue in existence. It can make no difference how it was destroyed, so long as the party was not in any degree in fault. The minds of the parties are presumed to have contemplated the possible destruction of the property, and not the manner of its destruction; and the supposed temptation and facility of the seller to destroy the property himself, cannot legitimately operate to affect the principle involved.

The judgment must be affirmed.

ALLEN, GROVER, and RAPALLO, JJ., concur; PECKHAM and FOLGER, JJ., dissent.

Judgment affirmed.

HULL v. HULL.[1]

(48 Connecticut, 250.—1880.)

LOOMIS, J. The controversy in this case has reference to

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[1] As to the sale of things having a *potential* existence, Mr. Benjamin, *Sales*, § 78, says: "Things not yet existing which may be sold, are those which are said to have a *potential existence*, that is, things which are the natural product or expected increase of something already belonging to the vendor. A man may sell the crop of hay to be grown on his field, the wool to be clipped from his sheep at a future time, the milk that his cows will yield in the coming month, and the sale is valid." This accords with the decision in *Grantham* v. *Hawley*, Hobart, 132, and prevails generally throughout the United States, although some jurisdictions exhibit a tendency to limit its application. In *The Rochester Distilling Company* v. *Rasey*, 142 N. Y. 570, 575, Gray, J., says: "*Grantham* v. *Hawley* (Hobart, 133) is the general source of authority for the proposition that one may grant what he has only potentially, and there is no good reason for doubting that that which has a potential, or possible existence, like the spontaneous product of the earth, or the increase of that which is in existence, may properly be the subject of sale, or of mortgage. The right to it, when it comes into existence, is regarded as a present vested right. That which is, however, the annual product of labor and of the cultivation of the earth cannot be said to have either an actual, or a potential existence before a planting." Such limitation, however, seems to apply only when

the ownership of six colts, the progeny of two brood mares, which the plaintiff, some ten years prior to this suit, purchased in Boston of the Rev. William H. H. Murray. The contract of sale provided that the plaintiff might take the mares to Murray's farm in this state, of which she was and had been for several years the superintendent, and there keep them as breeding mares; and all the colts thereafter foaled from them, though sired by Murray's stallions, were to be the exclusive property of the plaintiff.

No attempt has been made by Murray's creditors or his trustee to deprive the plaintiff of the mares so purchased, and they are now in her undisturbed possession; but the colts, while on Murray's farm on the first of August, 1879, were attached by one of his creditors, who subsequently released the property to the defendant as trustee in insolvency, who had the property in his possession at the time the plaintiff brought her writ of replevin.

The sole ground upon which the defendant claims to hold these colts is, that there was such a retention of possession by Murray after the sale as to render the transaction constructively fraudulent as against creditors.

The court below overruled this claim, and in so doing we think committed no error.

The doctrine as to retention of possession after a sale has no application to the facts of this case. A vendor cannot retain after a sale what does not then exist nor that which is already in the possession of the vendee. This proposition would seem to be self-sustaining. If, however, it needs confirmation, the authorities in this state and elsewhere abundantly supply it. *Lucas* v. *Birdsey*, 41 Conn. 357; *Capron* v. *Porter*, 43 id. 389; *Spring* v. *Chipman*, 6 Verm. 662. In *Bellows* v. *Wells*, 36 Verm. 599, it was held that a lessee might convey to his lessor all the crops which might be grown on the leased land during the term, and no delivery of the crops after they were harvested was necessary even as against attaching creditors, and that the doctrine

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the rights of third persons have intervened, as in cases of an attaching or an execution creditor. But it would seem that there may be valid agreements to sell, or *executory* contracts of sale, where the subject thereof is something to be subsequently acquired by the vendor, although such vendor have not even a potential right at the time in the thing contracted to be sold.

as to retention of possession after the sale did not apply to property which at the time of the sale was not subject to attachment and had no real existence as property at all.

The case at bar is within the principle of the above authorities, for it is very clear that the title to the property in question when it first came into existence was in the plaintiff.

In reaching this conclusion it is not necessary to hold that the mares became the absolute property of the plaintiff under Massachusetts law without a more substantial and visible change of possession, or that under our law, the title to the mares being in the plaintiff clearly as between the parties, the rule imported from the civil law, *partus sequitur ventrem*, applies.

We waive the consideration of these questions. It will suffice that, by the express terms of the contract, the plaintiff was to have as her own all the colts that might be born from these mares. That the law will sanction such a contract is very clear.

It is true, as remarked in Perkins on Conveyances (tit. *Grant*, § 65,) that "it is a common learning in the law that a man cannot grant or charge that which he has not;" yet it is equally well settled that a future possibility arising out of, or dependent upon, some present right, property or interest, may be the subject of a valid present sale.

The distinction is illustrated in Hobart, 132, as follows: "The grant of all the tithe wool of a certain year is good in its creation, though it may happen that there be no tithe wool in that year; but the grant of the wool which shall grow upon such sheep as the grantor may afterwards purchase, is void."

It is well settled that a valid sale may be made of the wine a vineyard is expected to produce, the grain that a field is expected to grow, the milk that a cow may yield, or the future young born of an animal. 1 Parsons on Contracts (5th ed.), page 523, note *k*, and cases there cited; Hilliard on Sales, § 18; Story on Sales, § 186. In *Fonville* v. *Casey*, 1 Murphy (N. C.), 389, it was held that an agreement for a valuable consideration to deliver to the plaintiff the first female colt which a certain mare owned by the defendant might produce, vests a property in the colt in the plaintiff, upon the principle that there may be a valid sale where the title is not actually in the grantor, if it is in him potentially, as being a thing accessory to something which he actually has. And in *McCarty* v. *Blevins*, 5 Yerg. 195, it was held that where A. agrees with B. that the foal of A.'s

mare shall belong to C., a good title vests in the latter when parturition from the mother takes place, though A. immediately after the colt was born sold and delivered it to D.

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There was no error in the judgment complained of and a new trial is not advised.

In this opinion the other judges concurred.

McCarty v. Blevins.

(5 Yerger, 195.—1833.)

Trover. Rogers allowed his horse to go to Buler's mare, with the understanding that if a colt should result, it should belong to one Pleasant Blevins, an infant. A colt was born, and defendant below, purchased it and the mare from Buler. Blevins, by his next friend, brought this action against McCarty to recover the colt. Verdict for Blevins. Defendant moved for a new trial, which was overruled.

By the court. Catron, C. J. It is insisted, that no title vested by the contract between Rogers and Buler, no colt then being in existence; that no right can be communicated to property of which the bargainor has no title in possession, actually or potentially. This, as a general proposition, is true; yet, during the time of gestation, surely, the owner of a female domestic animal has a potential right to contract for the sale of the increase, to vest in possession of the bargainee, when parturition from the mother takes place. The growing fleece of the sheep, and the crop of fruit or grain of the soil, are the subjects of sale; and why the issues and profits in colts or lambs should not be, it is difficult to apprehend. In horse-growing districts, mares of distinguished reputation and pedigree are constantly let in effect to breed them, the owner of the mare agreeing to take so much for the chance of the colt for one season, he retaining in his possession the mare, because too valuable to be trusted with another. That the foal in such cases, when dropped, is the property of the hirer of the mare, has never been the subject of doubt. Had Blevins taken the mare into possession, paying so

much per annum for her use generally, then he would have been authorized to use her as a brood mare, and to retain the foal. The feeding and attention by the owner could make no difference; it was generally a hiring.

On this foot the plaintiff is entitled to recover. Rogers hired the mare for Blevins for that season of gestation, for her use in breeding; he was to use her in this particular way; still Blevins is entitled to the increase as if she had been hired for the year generally, with the use unrestricted.

It is next insisted, no consideration passed from Blevins to Buler for the foal. Rogers agreed to give what Buler agreed to take. The consideration was valuable, and for anything appearing, satisfactory to the parties at the time the contract was made, and the defendant below cannot be heard to call in question its adequacy in this action for title. Let the judgment be affirmed.

Judgment affirmed.

Low et al. v. Pew et al.

(108 Massachusetts, 347.—1871.)

Replevin by A. Low & Co. to recover a quantity of halibut from the assignees in bankruptcy of J. Low & Co.

In April, 1869, the plaintiffs entered into the following agreement with J. Low & Co.:

"We, John Low & Son, hereby sell, assign and set over unto Alfred Low & Company all the halibut that may be caught by the master and crew of the schooner Florence Reed, on the voyage upon which she is about to proceed from the port of Gloucester to the Grand Banks, at the rate of five cents and a quarter per pound for flitched halibut, to be delivered to Alfred Low & Company as soon as said schooner arrives at said port of Gloucester at their wharf. And we, the said John Low & Son, hereby acknowledge the receipt of $1,500 in part payment for the halibut that may be caught by the master and crew of said schooner on said voyage."

Morton, J. By the decree adjudging John Low & Son

bankrupts, all their property, except such as is exempted by the bankrupt law, was brought within the custody of the law, and by the subsequent assignment passed to their assignees. *Williams* v. *Merritt*, 103 Mass. 184. The firm could not by a subsequent sale and delivery transfer any of such property to the plaintiffs. The schooner which contained the halibut in suit arrived in Gloucester, August 14, 1869, which was after the decree of bankruptcy. If there had been then a sale and delivery to the plaintiffs of the property replevied, it would have been invalid. The plaintiffs therefore show no title to the halibut replevied, unless the effect of the contract of April 17, 1869, was to vest in them the property in the halibut before the bankruptcy. It seems to us clear, as claimed by both parties, that this was a contract of sale, and not a mere executory agreement to sell at some future day. The plaintiffs cannot maintain their suit upon any other construction, because, if it is an executory agreement to sell, the property in the halibut remained in the bankrupts, and, there being no delivery before the bankruptcy, passed to the assignees. The question in the case therefore is, whether a sale of halibut afterwards to be caught is valid, so as to pass to the purchaser the property in them when caught.

It is an elementary principle of the law of sales, that a man cannot grant personal property in which he has no interest or title. To be able to sell property, he must have a vested right in it at the time of the sale. Thus it has been held that a mortgage of goods which the mortgagor does not own at the time the mortgage is made, though he afterward acquires them, is void. *Jones* v. *Richardson*, 10 Met. 481. The same principle is applicable to all sales of personal property. *Rice* v. *Stone*, 1 Allen, 566, and cases cited; *Head* v. *Goodwin*, 37 Maine, 181.

It is equally well settled that it is sufficient if the seller has a potential interest in the thing sold. But a mere possibility or expectancy of acquiring property, not coupled with any interest, does not constitute a potential interest in it, within the meaning of this rule. The seller must have a present interest in the property, of which the thing sold is the product, growth or increase. Having such interest, the right to the thing sold, when it shall come into existence, is a present vested right, and the sale of it is valid. Thus a man may sell the wool to grow upon his own sheep, but not upon the sheep of another; or the crops to grow upon his land, but not upon land in which he

has no interest. 2 Kent Com. (10th ed.) 468, (641) note *a*; *Jones* v. *Richardson*, 10 Met. 481; *Bellows* v. *Wells*, 36 Verm. 599; *Van Hoozer* v. *Corey*, 34 Barb. 9; *Grantham* v. *Hawley*, Hob. 132.

The same principles have been applied by this court to the assignment of future wages or earnings. In *Mulhall* v. *Quinn*, 1 Gray, 105, an assignment of future wages, there being no contract of service, was held invalid. In *Hartley* v. *Tapley*, 2 Gray, 565, it was held that, if a person is under a contract of service, he may assign his future earnings growing out of such contract. The distinction between the cases is, that in the former the future earnings are a mere possibility, coupled with no interest, while in the latter the possibility of future earnings is coupled with an interest, and the right to them, though contingent and liable to be defeated, is a vested right.

In the case at bar, the sellers, at the time of the sale, had no interest in the thing sold. There was a possibility that they might catch halibut; but it was a mere possibility and expectancy, coupled with no interest. We are of opinion that they had no actual or potential possession of, or interest in, the fish; and that the sale to the plaintiffs was void.

The plaintiffs rely upon *Gardner* v. *Hoey*, 18 Pick. 168, and *Tripp* v. *Brownell*, 12 Cush. 376. In both of these cases it was held that the lay or share in the profits, which a seaman in a whaling voyage agreed to receive in lieu of wages, was assignable. The assignment in each case was, not of any part of the oil to be made, but of the debt which under the shipping articles would become due to the seaman from the owners at the end of the voyage. The court treated them as cases of assignments of choses in action. The question upon which the case at bar turns did not arise, and was not considered.

Judgment for the defendants.

McConnell v. Hughes.[1]

(29 Wisconsin, 537.—1872.)

Plaintiff alleges that on February 7, 1870, he sold 855$\frac{53}{60}$ bushels of wheat to defendants at ten cents per bushel less than the Milwaukee price on any day thereafter which plaintiff should name, and that he delivered and defendants received the same a few days thereafter; that plaintiff subsequently named March 24, 1870, as the day for fixing the price, and that the price so fixed was seventy-three cents per bushel: that he so notified defendants, and demanded payment, of which only seventy-five dollars on account has been paid. Defendants answer that they agreed to buy when plaintiff should elect to sell, and that on March 11, 1870, before plaintiff so elected, their mill and plaintiff's wheat therein were destroyed by fire without fault on their part.

Judgment for plaintiff; defendants appeal.

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[1] The price in money, or in money's worth, paid or promised to be paid, is the consideration supporting a contract of sale. The price may be expressly determined by the contract, or left to be determined in a manner according to the terms of the contract, *e. g.*, "ten cents per bushel less than the Milwaukee price on a future day to be named by the vendor," or it may be left to be determined by a later agreement of the parties. In the absence of an agreement for its determination, the goods having been delivered to the vendee, the law will imply an agreement to pay the reasonable value of the goods. As a general rule, the reasonable value is the market price at the time and place of delivery. It may be that the market price is "highly unreasonable from accidental circumstances," and then it becomes a question of fact, to be determined in view of all the circumstances of the case. It seems to be the rule that executory, as well as executed, contracts of sale, are binding, though the price has not been determined by agreement, on the theory that the law will imply an agreement to pay a reasonable price.

The Personal Property Law of New York, Laws of 1897, ch. 417, § 22, provides that, "An agreement for the purchase, sale, transfer or delivery of a certificate or other evidence of debt, issued by the United States or by any state, or a municipal or other corporation, or of any share or interest in the stock of any bank corporation or joint stock association, incorporated or organized under the laws of the United States or of any state, is not void or voidable, for want of consideration, or because of the nonpayment of consideration, or because the vendor, at the time of making such contract, is not the owner or possessor of the certificate or certificates or other evidence of debt, share or interest."

LYON, J. The bill of exceptions does not purport to contain all of the evidence.

We cannot, therefore, review the evidence, but must presume that it sustains the findings of fact by the circuit court. That court having found that the material allegations of the complaint were proved, it follows that if the complaint states a valid cause of action, the plaintiff was entitled to judgment.

We think that the complaint does state a valid cause of action. It avers that an executory contract for the sale and purchase of wheat was made by the parties, and that, in pursuance thereof, the plaintiff delivered to the defendants, and the defendants accepted and received the wheat. It must be true that by such delivery and acceptance the title to the wheat became vested in the defendants, and the right to have the price therefor, when the same should be determined as provided in the contract, in like manner became vested in the plaintiff.

But it is urged on behalf of the defendants that the transaction was invalid as a sale, because the contract did not limit the plaintiff to the selection of any particular day, or of a day within a specified time, on which the market price of wheat in Milwaukee should control the price of the wheat in question, but left him the option to select any day in the future for the purpose of fixing the price.

The contract furnishes a criterion for ascertaining the price of wheat; leaving nothing in relation thereto for further negotiation between the parties. This is all that the law requires. Story on Sales, § 220. No case has been cited, and we are unable to find one, which holds that it is essential to the validity of a sale in such cases that the criterion agreed upon should, by the terms of the contract of sale, be applied, and the price thereby determined, on any specified day or within a specified time. Judge Story, in the section of his treatise above cited, evidently does not intend to lay down any such rule. It may be that, if the plaintiff had delayed unreasonably to make such selection after being requested to make the same, he might be compelled to do so. But we do not decide this point.

It is further argued that, after a valid sale and before payment of the price, there must be a debt owing by the vendee to the vendor, while in this case, until the price of the wheat was ascertained, there was no indebtedness. The latter part of this proposition is erroneous. As soon as the wheat was delivered,

the defendants owed the plaintiff therefor. There was therefore a debt, but the amount thereof was not ascertained. It remained unliquidated until the price of the wheat was determined.

The objections that the assessor could not list the claim for the price of the wheat for taxation, and that the same could not be reached by garnishee process at the suit of a creditor of the plaintiff, while such price remained undetermined, present no practical difficulties. The assessor would fix the value of the demand according to his best judgment, as in other cases of the valuation of property and credits; and the creditor in the garnishee proceeding would probably be subrogated to the rights of the plaintiff in respect to determining the contract price for the wheat.

By the Court. The judgment of the circuit court is affirmed.

MITCHELL v. GILE.

(12 New Hampshire, 390.—1841.)

ASSUMPSIT to recover for ten and one-half cords of wood sold and delivered.

At the trial it appeared that the plaintiff had on his land a quantity of seasoned wood, of which the defendant wished to borrow a portion, in order to complete a boat load which he was about to send to market, and the plaintiff gave him permission to take what he wished for that purpose; and as the defendant proposed to cut some wood in the spring from his own land, it was agreed that the plaintiff should have as much of that wood as the defendant should take of the plaintiff's wood.

In pursuance of such agreement, the defendant took ten and one-half cords of the plaintiff's wood, and the plaintiff afterwards demanded of the defendant a like quantity, but he neglected to deliver it.

GILCHRIST, J. There is a class of cases where it is unnecessary to declare upon the special contract which the parties may have made. Where one party agrees to do a certain thing, and the other party agrees to pay a sum of money, and the thing or

duty is performed, but the other party refuses to pay the money, an action lies for the money, because a debt has accrued, and nothing remains to be done but to pay it. There seems to be no reason in such a case why a general count should not be sufficient for the recovery of the money due. The plaintiff's claim does not then sound in damages, but is for a definite sum. Such is the principle recognized in *Bank of Columbia* v. *Patterson's Exrs.*, 7 Cranch, 303; *Williams* v. *Shannon*, 12 Wend. 109; *Jewell* v. *Schroeppel*, 4 Cowen, 564; *Felton* v. *Dickinson*, 10 Mass. 287; *Sheldon* v. *Cox*, 3 B. & C. 420, and in the cases generally, whenever the point is adverted to.

There is another class of cases, where the only remedy for the plaintiff is by an action on the special agreement, because it still remains open and unrescinded. In general, where goods are sold to be paid for wholly or in part by other goods, or by the defendant's labor, or otherwise than in money, the action must be on the agreement, and for a breach of it, and not for goods sold and delivered. And this is especially the case unless there be a sum of money due the plaintiff on the contract, and that part of it which is for something else than money has been performed by the defendant, so that there is nothing to be done which can be the subject of future litigation. In such case perhaps the plaintiff may declare that the defendant was indebted to him in a sum of money for goods sold and delivered to him in exchange. But in a case tried before Mr. Justice Buller, where the declaration was for goods sold and delivered, and the contract proved was, that the goods should be paid for partly in money and partly in buttons, the plaintiff was nonsuited, for not declaring on the special agreement. *Harris* v. *Fowle*, cited in the case of *Barbe* v. *Parker*, 1 H. Bl. 287. There is also an old case on this point in *Palmer's Reports*, 364, *Briggs' Case*, where one in possession of land promised to make a lease of it, and took a fine for the lease, after which, and before the lease was made, he was evicted from the land. It was held that debt did not lie to recover the money paid for the fine; and the principle of the decision seems to have been, that the contract to make the lease being still subsisting, the plaintiff should have sued upon that contract. And the authorities are nearly uniform, that where goods are delivered on a special agreement, a mere failure to perform, by the defendant, does not rescind the agreement; but it is still executory and subsist-

ing, and the remedy is by an action upon it. *Raymond* v. *Bearnard*, 12 Johns. 274; *Jennings* v. *Camp*, 13 Johns. 94; *Clark* v. *Smith*, 14 Johns. 326; *Robertson* v. *Lynch*, 18 Johns. 451; *Dubois* v. *Del. & Hudson Canal Co.*, 4 Wend. 289; *Talver* v. *West*, Holt, 178. And in *Weston* v. *Downes*, Dougl. 23, the court expressly held, that if a contract be rescinded, an action for money had and received will lie for money paid under it; but if the contract be broken, this action will not lie, but an action for a breach of the contract must be brought. This principle is fully recognized in *Towers* v. *Barrett*, 1 T. R. 133, and in *Davis* v. *Street*, 1 C. & P. 18. Opposed to the general current, both of the English and American authorities on this point, are the intimations and the reasoning of Mr. Justice Cowen, in the case of *Clark* v. *Fairfield*, 22 Wend. 522. He expresses the opinion that the cases will justify the position, that though the compensation for the goods, or other thing advanced, is to be rendered in services, or some other specific thing, if the party promising to render be in default, *indebitatus assumpsit* will lie for the price of the thing advanced. He admits that this position goes beyond any direct adjudication in England, although he thinks it may be maintained by the principle of many cases there, and that it is just that in such a case a general count should be maintained. He cites, with approbation, the case of *Way* v. *Wakefield*, 7 Vermont R. 223, 228, where Mr. Justice Collamer says, that "whenever there are goods sold, work done, or money passed, whatever stipulations may have been made about the price, or mode, or time of payment, if the terms have transpired so that money has become due, the general count may be maintained." The action was for harness sold, to be paid for in lumber at a specified time. There being a default in payment, the court allowed the general count for harness sold. Mr. Justice Cowen admits that "the learned judge certainly did not cite any direct authority for thus applying the rule," and we are not aware that any authority exists for such an application of it. To the rule, as above stated, there may, perhaps, be no objection. The question in cases of such a character always is, whether the money has become due; and if no more be meant than that a general count will lie, where a contract has been performed, and has resulted in an obligation to pay money, then we assent to the correctness of the position. Of the propriety of the application of the rule to the facts in

the case of *Way* v. *Wakefield*, we may be permitted, respectfully, to express a doubt. It is true that a general count may sometimes be maintained, where the goods were to be paid for by other goods. Of this character is the case of *Forsyth* v. *Jervis*, 1 Starkie's Reports, 437. The plaintiff sold the defendant a gun for forty-five guineas, and agreed to take of the defendant a gun, in part payment, at the price of thirty guineas. Lord Ellenborough held that as here was a sale of goods, to be paid for in part by other goods at a stipulated price, upon the refusal of the purchaser to pay for them in that mode, a contract resulted to pay for them in money, and that the forty-five guineas might be recovered under a count for goods sold. This case has every characteristic of a sale. The plaintiff sold the gun for a specified price; the defendant agreed to give, in part payment, another gun for a stipulated price, and was bound either to deliver the gun or pay its price. As he refused to deliver the gun, a decision that he was indebted to the plaintiff for its price accords with the general tone of the authorities. In relation to the case of *Clark* v. *Fairchild*, it is also to be remarked, that in the subsequent case of *Ladue* v. *Seymour*, 24 Wend. 62, Mr. Justice Bronson says, that where there is a subsisting special contract between the parties in relation to the thing done, all the cases agree that the contract must control, and that the remedy is, in general, upon that, and not upon the common counts in assumpsit.

But apart from authority, and from technical reasoning depending upon authority for much of its force, it is proper that the form of the remedy should be adapted to the actual state of facts. In no other mode of declaring can the proper rule of damages be applied, where there has been a breach of a special contract. If goods are sold and delivered, the price, or value, at the time of the transaction, is the measure of damages, unless there be something showing a different intention by the parties. The plaintiff is entitled to the value of the goods he has parted with, at the time, and to nothing more; now can the defendant be compelled to pay more than the value at the time he received them. Both parties act with reference to the value at the time of the transaction. But where a party agrees, but neglects to deliver goods at a specified time, the damages for the non-fulfilment of such an agreement are to be calculated according to their value at the time they should have been delivered. If

the articles have fallen in price, the defendant will be entitled to the benefit of such a change in the market; if they have risen, the increase in value will belong to the plaintiff. There is, therefore, a substantial reason why the rights of both parties can be better secured, by declaring specially upon a breach for the non-fulfilment of a contract to deliver goods, than by declaring upon the general count; and this reason probably has had its effect in causing the forms of the remedy to be kept distinct. *Leigh* v. *Patterson*, 8 Taunt. 540; *Gainsford* v. *Carroll*, 2 B. & C. 624; *Shaw* v. *Nudd*, 8 Pick. 9.

If, where goods are sold to be paid for otherwise than in money, and the vendee neglects to perform, an action must be brought on the special agreement, there is a still stronger reason for adopting the same form of the remedy where the goods are not sold, but exchanged. In the former case, the goods are at least sold; and so far the evidence supports the declaration. But the latter case has no feature in common with a contract, necessary to support a count for goods sold and delivered. Now the transaction between these parties was, properly speaking, an agreement for an exchange of goods, and not for a sale. Blackstone, 2 Com. 446, says: "if it be a commutation of goods for goods, it is more properly an exchange; if it be a transferring of goods for money, it is called a sale." Here the defendant agreed to deliver to the plaintiff as much wood as he received of him. This agreement the defendant failed to perform. There is, then, a breach of the special agreement, and there is nothing else. The injury sustained by the plaintiff is to be compensated by a recovery of damages for the breach. There is nothing in the case that shows a sale of the wood by either party to the other; nor can the transaction be considered a sale, without a disregard of all the authorities which distinguish actions sounding in damages for a breach of contracts, from actions to recover a definite sum as the purchase money for goods sold.

Nor is the case altered by the fact that no suit could be maintained without a demand. The wood was to be delivered to the plaintiff at such time as he should desire it. The plaintiff would have a right to the performance of the agreement whenever he should notify the defendant that he desired the wood. There could be no breach of the agreement by the defendant until after this notice; and a refusal to deliver was

a breach, for which an action is maintainable. That a demand, in a given case, is necessary before a suit can be maintained on a special contract, by no means proves that the demand alters the form of the remedy to which the plaintiff is entitled. It might as well be said, that because an action on a special contract could not be maintained until a given period had elapsed, therefore the lapse of time altered the form of the remedy. Undoubtedly, a demand and refusal may, in some cases, have this effect, but the result does not necessarily follow because the demand must be made.

The opinion of the court is, that the plaintiff has misconceived his remedy, and that this action cannot be maintained.

Plaintiff nonsuit.

GROVER v. GROVER.

(24 Pickering, 261.—1837.)

ASSUMPSIT upon a promissory note, made by the defendant to the order of Hiram S. Grover, the plaintiff's intestate.

At the trial it appeared that, in March, 1832, Grover V. Blanchard called to see the intestate. Upon an inquiry being made, whether the intestate had put on record a deed of mortgage given to secure the payment of the note in question, the intestate produced the deed, which had not then been recorded, and the note, and said to Blanchard, "I will make a present of these to you, if you will accept them." Blanchard took them and put them in his pocket, saying that he would accept them as a token of love, or affection, or respect. Before they parted, Blanchard handed them back to the intestate, saying "You may keep the papers until I call for them, or collect them for me." No assignment was made on the note or mortgage. Afterwards the intestate put the mortgage on record. The plaintiff, after the death of the intestate, in October, 1832, took the deed from the register's office, and, having received payment of the amount secured thereby, discharged the mortgage. Upon the death of the intestate, the note was found in his chest, among other papers; and Blanchard took it, refused to deliver it to the plaintiff, and caused this action to be brought.

WILDE, J., delivered the opinion of the court:

The jury have found, that the deceased intended to give the property in the note, and in the mortgage made to secure it, absolutely, to Blanchard; and the question is, whether by the rules of law this intention can be carried into effect.

It is objected, that no valid gift of a chose in action can be made *inter vivos*, without writing, and this objection would be well maintained, if a legal transfer of a chose in action were essential to give effect to a gift. But as a good and effectual equitable assignment of a chose in action may be made by parol, and as courts of law take notice of and give effect to such assignments, there seems to be no good foundation for this objection. It is true that the cases, which are numerous, in which such equitable assignments have been supported, are founded on assignments for a valuable consideration; but there is little, if any, distinction in this respect, between contracts and gifts *inter vivos;* the latter indeed, when made perfect by delivery of the things given, are executed contracts. 2 Kent's Com. (3d ed.) 438. By delivery and acceptance the title passes, the gift becomes perfect, and is irrevocable. There is, therefore, no good reason why property thus acquired should not be protected as fully and effectually as property acquired by purchase. And so we think that a gift of a chose in action, provided no claims of creditors interfere to affect its validity, ought to stand on the same footing as a sale.

The cases favorable to the defense do not depend on the question, whether an assignment must be in writing, but on the question, whether a legal transfer is not necessary to give validity to a donation of a chose in action. The donation of a note of hand payable to bearer, or of bank notes, lottery tickets and the like, where the legal title passes by delivery, is good; for by the form of the contract no written assignment is necessary; but as to all other choses in action, negotiable securities excepted, it has been held in several cases, that they are not subjects of donation *mortis causa*, on the ground undoubtedly, for I can imagine no other, that a legal assignment is necessary to give effect to such donations; and the same reason would apply to donations *inter vivos*. The leading case on this point is that of *Miller* v. *Miller*, 3 P. Wms. 356, in which it was held, that the gift of a note, being a mere chose in action, could not take effect as a donation *mortis causa*, because no property therein could

pass by delivery, and an action thereon must be sued in the name of the executor. But in *Snellgrave* v. *Bailey*, 3 Atk. 214, Lord Hardwicke decided, that the gift and delivery over of a bond was good as a donation *mortis causa*, on the ground that an equitable assignment of the bond was sufficient. It seems to be very difficult to reconcile these two cases. The distinction suggested by Lord Hardwicke in the case of *Ward* v. *Turner*, 2 Ves. Sen. 431, in which he adheres to the decision in *Snellgrave* v. *Bailey*, is technical, and, to my mind, unsatisfactory; and certainly has no application to our laws, which place bonds and other securities on the same footing. We cannot, therefore, adopt both decisions without manifest inconsistency; and we think, for the reasons already stated, that the decision in *Snellgrave* v. *Bailey* is supported by the better reasons, and is more conformable to general principles, and the modern decisions in respect to equitable assignments. We are, therefore, of opinion that the gift of the note of hand in question is valid; and in coming to this conclusion, we concur with the decision in the case of *Wright* v. *Wright*, 1 Cowen, 598 [overruled by *Harris* v. *Clark*, 3 N. Y. 93], wherein it was held, that the gift and delivery over of a promissory note, *mortis causa*, is valid in law, although the legal title did not pass by the assignment.

* * * * * * * *

Another objection is, that if the gift was valid and complete, by the delivery of the note, it was annulled by the redelivery to the donor. We think this objection also is unfounded. In the case of *Bunn* v. *Markham*, 7 Taunt. 230, Gibbs, C. J., lays it down as a well settled principle, that if after a donation *mortis causa*, the donor resumes possession, he thereby revokes and annuls the donation. This is the law no doubt. Whether there may not be an exception to this rule, when the donor takes back the thing given at the request of the donee, for a particular purpose, and agrees to act as his agent under circumstances negativing every presumption that he intended to revoke his gift, is a question which it is not necessary now to consider; for the principle has no relation to a donation *inter vivos*. When such a donation is completed by delivery, the property vests immediately and irrevocably in the donee; and the donor has no more right over it than any other person. But a donation *mortis causa* does not pass a title immediately, but is only to

take effect on the death of the donor, who in the meantime has the power of revocation, and may at any time resume possession and annul the gift.

* * * * * * * *

Judgment for plaintiff for the use of Blanchard.

NOBLE v. SMITH ET AL.

(2 Johnson, 52.—1806.)

THIS was an action of *trespass*, for breaking and entering the close of the plaintiff, cutting down, taking and carrying away, the wheat in the straw, which was there standing, and converting the same to his own use.

The plaintiff proved, that he was put into possession of the *locus in quo* in March, 1805, by virtue of a writ of *habere facias possessionem*, issued on a judgment in ejectment against one Hallett, and that he continued in possession to the time of the trespass. It was also proved that the defendants, in July, 1805, broke and entered the close, and cut down and carried away about 200 bushels of wheat in the straw.

Hallett had lived on the farm as tenant to John Hill, the principal of the plaintiff, above two years before the plaintiff was put into possession. After Hallett was dispossessed, he was sued, and taken on execution for rent due to Hill. The witness, who thus testified, applied to the plaintiff, to let Mrs. Hallett have some of the wheat then growing on the premises, for seed; and the plaintiff told the witness, that "he would give the wheat growing, to the defendants, the Smiths, for the support of themselves and Mrs. Hallett, and would procure a written surrender to be drawn up for Hallett to execute." The Smiths, afterwards, requested the plaintiff to give them a writing for the wheat, which the plaintiff refused to do, saying, "that he would reserve it for them, if he should demise the premises to any other person." Another witness said that the plaintiff, in October, 1805, had told him that he had given the wheat to the Smiths, but that he had revoked the gift, because they had offended him.

The judge charged the jury, that there was sufficient evidence of a valid gift, and that it was irrevocable.

The plaintiff was nonsuited.

KENT, Ch. J., delivered the opinion of the court:

This case presents the following questions. 1. Can property in corn, growing, be transferred, by gift? 2. Is there here the requisite evidence of such a gift?

After a consideration of this case, I am satisfied, that the opinion which I gave at the circuit, upon the trial of this cause, was incorrect.

Lord Coke is reported to have said, in *Wortes* v. *Clifton*, 1 Rol. Rep. 61, that by the civil law, a gift of goods was not valid, without delivery, but that it was otherwise, by our law. This is a very inaccurate *dictum*, and the difference between the two systems is directly the reverse. By the civil law, a gift, *inter vivos*, was valid and binding, without delivery (Inst. lib. 2, tit. 7, § 2; Code, lib. 8, tit. 54, l. 3, l. 35, § 5); but at common law, it is very clear, from the general current of authorities, that delivery is essential to give effect to a gift. (Bracton, *de acq. rerum dom.* lib. 2, fo. 15, *b*. 16, *a*; Noy, 67; Str. 955; Jenkins, 109; 2 Black. Com. 441.) In the analogous case, also, of gifts, *causa mortis*, it was held, by Lord Hardwicke, in the case of *Ward* v. *Turner*, 2 Vesey, 431, where the subject underwent a very full discussion, that a delivery was necessary to make the gift valid; and, accordingly, that a delivery of receipts, for south sea annuities, was not a sufficient delivery to pass these annuities by that species of gift.

Delivery, in both kinds of gift, is equally requisite, on grounds of public policy and convenience, and to prevent mistake and imposition.

If delivery be requisite, there was none in the present case. The land, at the time of the alleged gift, was in possession of one *Hallett*, and not of any of the defendants, to whom the gift is said to have been made; and before the wheat was ripe, the plaintiff recovered the possession of the land, by due course of law. Here was not even an attempt at a symbolical delivery, and giving the testimony the strongest possible construction, in favor of the defendants, it amounted to nothing more than saying, *I give*, without any act to enforce it. A mere symbolical delivery, would not, I apprehend, have been sufficient. The

cases in which the delivery of a symbol has been held sufficient to perfect the gift, were those in which it was considered as equivalent to actual delivery, as the delivery of a key of a trunk, of a room or warehouse, which was the true and effectual way of obtaining the use and command of the subject. (2 Vesey, 442, 443; 4 Brown, 286; Toller's Law of Exc. 181, 182.) I do not know, that corn, growing, is susceptible of delivery, in any other way, than by putting the donee into possession of the soil; but it is not necessary to give any opinion, at present, to that extent; nor do the court mean to do so. It is sufficient to say, that there was no evidence of delivery, in the present case, and that, to presume one, we must go the whole length of the example, given in the Roman law, where the buyer is supposed to take possession of a large, immovable column, by his eyes and his affections, *oculis et effectu.* (Dig. 41, 2. 1. 21.) The courts of equity seem to have adopted the true rule in their decisions, on the *donatio causa mortis*, in which they hold, that the delivery must be actual and real, or, by some act, clearly equivalent.

The opinion of the court, therefore, is, that the nonsuit be set aside, and a new trial awarded, with costs, to abide the event of the suit.

New trial granted.

GRYMES v. HONE.

(49 New York, 17.—1872.)

ACTION to recover 20 shares of stock, or their value, claimed by the plaintiff as a gift *mortis causa* from the defendant's testator. Judgment was entered in favor of the plaintiff upon the report of a referee, directing the defendant, as executor, to permit the transfer of said shares of stock on the books of the bank, to surrender the certificate therefor, and to account for dividends received since the testator's death, and in case the stock was sold to pay its equivalent out of the estate. The General Term of the Supreme Court affirmed the judgment.

PECKHAM, J. On the 19th of August, 1867, the alleged

donor being the owner of 120 shares of stock, included in one certificate, in the Bank of Commerce of New York City, made an absolute assignment in writing, transferable on the books of the bank on the surrender of the certificate, under seal and witnessed, of twenty shares thereof to this plaintiff, his favorite granddaughter, for value received, as the assignment purports, and appointed her his attorney irrevocable to sell and transfer the same to her use. After this paper had been signed, "he kept it by him for awhile" (how long, nowhere appears), and afterward handed it to his wife to put with the will and other papers in a tin box she had. When he gave to his wife the paper so drawn, he said: "I intend this for Nelly. If I die, don't give this to the executors; it isn't for them, but for Nelly; give it to her, herself." She asked, "why not give it to her now?" "Well," he said, "better keep it for the present; I don't know how much longer I may last or what may happen, or whether we may not need it." This is the statement, as given by the widow of donor. It was admitted that, at the time of executing said instrument, the donor was from seventy-eight to eighty years of age, was in failing health, and so continued till his death, January 23, 1868. Upon these facts was there a valid gift *mortis causa?*

Upon the question as to what constitutes such a gift, the authorities are infinite, not always consistent. But at this time it is generally agreed that, to constitute such a gift, it must be made with a view to the donor's death from present illness or from external and apprehended peril. It is not necessary that the donor should be *in extremis*, but he should die of that ailment. If he recover from the illness or survive the peril, the gift thereby becomes void; and until death it is subject to his personal revocation. (2 Kent, 444, and cases cited; 2 Redfield, Wills, 299, *et seq.;* 1 Story's Eq., § 606, etc., notes and authorities.)

In the next place there must be a delivery of it to the donee or to some person for him, and the gift becomes perfected by the death of the donor.

Three things are necessary. 1. It must be made with a view to donor's death. 2. The donor must die of that ailment or peril. 3. There must be a delivery. The appellant insists that the gift in this case fulfills neither requisition.

Was this gift made with a view to the donor's death? It is

so found by the referee as a question of fact. What the witness intended to convey by the term "failing health" is not clear; but intendments are against the appellant where the fact is left uncertain. There is nothing in the case inconsistent with the idea that the testator, when he signed this assignment, was confined to his bed and so continued till his death; though I do not wish to be understood as saying that such confinement was necessary to validate the gift. It seems that he died, as the referee finds, from this failing health, in five months thereafter; so that the terms, as used, indicated a very serious ailment.

True, he did not, and of course could not, know when death would occur when he executed this assignment, but he was in apprehension of it. His age and his "failing" told him death was near, but when it might occur he had no clear conviction. An ailment at such an age is extremely admonitory.

From these facts, can this court say, as matter of law, that this testator was not so seriously ill when he executed this assignment as to be apprehensive of death; that he was not legally acting "in view" of death; that he was not so ill as to be permitted to make this sort of gift? True, the donor died five months thereafter; but we are referred to no case or principle that limits the time within which the donor must die to make such a gift valid. The only rule is that he must not recover from that illness. If he do, the gift is avoided. The authorities cited by the appellant's counsel, of *Weston* v. *Hight*, 5 Shep. Me. 287, and *Staniland* v. *Willott*, 3 McN. & Gor. Ch. R. 664, are both instances of recovery, and the gifts, on that ground, declared void. In the latter the donor and his committee recovered back the stocks given, because of his recovery. The first case is improperly quoted in 2 Red. 300, note 11, as not originally authorizing the gift.

The declaration of the donor, that his wife should keep the assignment and not hand it over until after his death, as he did not know what might happen, nor but that they might need it, was simply a statement of the law, as to such a gift, whether the declaration was or was not made. Clearly he could not tell whether he should die or recover from that ailment. If he did recover, the law holds the gift void.

The transaction as to such a gift is, the donor says, I am ill, and fear I shall die of this illness; wherefore I wish you to take these things and hand them to my granddaughter after my

death; but do not hand them to her now, as I may recover and need them. A good *donatio mortis causa* always implies all this. If delivered absolutely to the donee in person, the law holds it void in case the donor recovers, and he may then reclaim it. (*Staniland* v. *Willott*, *supra.*)

To make a valid gift *mortis causa*, it is not necessary that there should be any express qualification in the transfer or the delivery. It may be found to be such a gift from the attending circumstances, though the written transfer and the delivery may be absolute. See the last case.

I think this donor made this gift "with a view to his death," within the meaning of the rule on that subject.

2. This also settles the second requisite, as it is admitted that he did not recover, but died of this "failing health," as it is expressed.

3. Was there a delivery? The assignment was delivered to his wife for the donee. She thus became the agent of the donor. So far as the mere delivery is concerned this is sufficient. (See the elementary writers before cited; also *Drury* v. *Smith*, 1 P. W. 404; *Sessions* v. *Moseley*, 4 Cush. 87; *Coutant* v. *Schuyler*, 1 Paige, 316; *Borneman* v. *Sidlinger*, 8 Shep. Me. 185; *Wells* v. *Tucker*, 3 Binn. 366; *Hunter* v. *Hunter*, 19 Barb. 631.) Such a delivery to be given to the grantee after the grantor's death, is good as to a deed of real estate. (*Hathaway* v. *Payne*, 34 N. Y. 92.)

It is urged that this gift was not completed; that the stock was not transferred on the books of the bank, and could not be until the certificate held by the donor was surrendered, and that equity will not aid volunteers to perfect an imperfect gift.

Within the modern authorities this gift was valid, notwithstanding these objections. The donor, by this assignment and power, parted with all his interest in the stock assigned as between him and the donee, and the donee became the equitable owner thereof as against every person but a *bona fide* purchaser without notice. Delivery of the stock certificate without a transfer on the bank's books would have made no more than an equitable title as against the bank (*N. Y. and N. H. R. Co.* v. *Schuyler*, 34 N. Y. 80, and cases cited), though it would give a legal title as against the assignor. (*McNeil* v. *Tenth Nat. Bank*, 46 N. Y. 325, just decided, and according to the case

of *Duffield* v. *Elwes*, 1 Bligh. N. S. 497, 530, decided in the house of lords.) The representatives of the donor were trustees for the donee by operation of law to make the gift effectual. (See also to the same effect *Ex parte Pye*, 18 Ves. 140; *Kekewich* v. *Manning*, 1 DeG., M. & G. 176; *Richardson* v. *Richardson*, 3 Eq. Cas. 686.) This trust, like the gift, is revocable during the donor's life, and is perfected and irrevocable by his death.

This extended the law as laid down by Lord Hardwicke, in *Ward* v. *Turner*, 2 Ves. Sr. 431, 442, upon this subject, and our courts have gone in the same direction with *Duffield* v. *Elwes*. Where notes payable to the donor's order and not indorsed, and other things of similar character, have been given *mortis causa*, courts compel the representatives of the donor to allow the donee to sue in their name, though the legal title has not passed. (See last case; *Grover* v. *Grover*, 24 Pick. 261; *Chase* v. *Redling*, 13 Gray, 418; *Bates* v. *Kempton*, 7 id. 382; and see also *Westerlo* v. *De Witt*, 36 N. Y. 340; *Walsh* v. *Sexton*, 55 Barb. 251.)

The equitable title to this stock is thus passed by the assignment, and it was not necessary to hand over the certificate. A court of equity will compel the donor's representatives to produce the certificate that the legal title to the stock may be perfected.

As there is great danger of fraud in this sort of gift, courts cannot be too cautious in requiring clear proof of the transaction. This has been the rule from the early days of the civil law (which required five witnesses to such a gift) down to the present time. In this case the proof of the assignment, etc., is entirely clear, the question being as to its effect. The judgment should be affirmed, with costs to be paid out of the estate.

All concur; ALLEN, J., not voting.

Judgment affirmed.

Mallory v. Willis.

(4 New York, 76.—1850.)

Replevin for 75 barrels of flour. At the trial the following agreement between the parties was read in evidence:

"The said Mallory & Legg agree to deliver, or cause to be delivered, at the Hopeton Mills, during the time of navigation, a quantity of good merchantable wheat, be the same more or less, to be manufactured into flour, which the said Willis agrees to do as follows: For every four bushels and fifteen pounds of wheat, said Willis is to deliver to said Mallory & Legg, or their order, one hundred and ninety-six pounds of superfine flour, packed in barrels well fitted for the purpose; barrels to be furnished by said Mallory & Legg. Said Willis to guaranty the inspection of said flour—if scratched—to pay all losses sustained thereby. Said Mallory & Legg to have all the offals, or feed, &c.; said Willis to store the same until sold. And further, by said Willis performing on his part as above stated, said Mallory & Legg agree to pay him sixteen cents per barrel.

"If said Mallory & Legg make one shilling net profit on each and every barrel of flour made at said mills, they are to pay said Willis two cents per barrel extra."

In pursuance of said agreement, plaintiffs delivered at the mills 32,586 bushels and 4 pounds of wheat, which Willis manufactured into superfine flour; and the evidence tended to show that the 75 barrels of flour in question, was the surplus left after delivering to plaintiffs 7,667 barrels and 156 pounds of flour, equal to 196 pounds for every 4 bushels and 15 pounds of wheat. The defendants insisted that the title to the wheat passed to Willis by force of the contract, and the delivery thereunder; and, therefore, that the plaintiffs could not recover the flour manufactured from the same wheat. The court held that the contract was one of bailment and not of sale; that the title to the wheat did not pass; and that the plaintiffs were entitled to recover, unless the defendants proved that the 75 barrels was the surplus flour after delivering to the plaintiffs 196 pounds for every 4 bushels and 15 pounds of wheat delivered under the contract.

HURLBUT, J. If the contract was one of bailment, and if by a proper construction of it the defendants were entitled to the surplus flour, I think the burthen would have rested on them of showing that the article in question was such surplus, after the plaintiffs had established that it was the produce of their wheat; so that taking the most favorable view for the defendants, there was no error in point of law in this branch of the decision at the circuit, which would entitle them to except, and the only question for our decision is, whether the contract and the delivery under it, amounted to a sale or a bailment of the wheat.

The defendants refer us to that part of the contract which binds them to deliver a barrel of superfine flour and to guaranty its inspection, for every $4\frac{1}{4}$ bushels of wheat, which it is alleged, if the plaintiffs' construction is to prevail, is not only an unreasonable and hard contract for the defendants, but is altogether inconsistent with the notion of a bailment; for it is asked, if it were not a sale, why should the defendants guaranty that the flour should bear inspection, or why should they agree for a certain quantity of wheat to deliver a barrel of flour? It may be remarked in answer to this, that the defendants being experienced millers must be deemed to have contracted with a knowledge of the quantity of wheat required to yield a barrel of flour; and as the plaintiffs were obliged by the contract to deliver good merchantable wheat, it seems but reasonable that the defendants should have been required so to manufacture it, as that the flour would bear inspection; that these provisions must be viewed in the connection in which they stand, and receive a construction which shall make them harmonize with the whole expression of the contract between the parties; and that taking the whole agreement into view, they seem to have been inserted at the suggestion of the plaintiffs, for the purpose, in part, at least, of causing a skilful and prudent manufacture of the wheat into flour; and even if they were employed to define the quantity of flour to be returned, they would not overbear the other provisions of the agreement, which import very clearly an understanding between the parties that the identical wheat which was delivered by the plaintiffs, should be manufactured into flour for their benefit; that they were to pay for the work a stipulated price in money, and to receive the manufactured article, together

with the offals or feed, which should come from the wheat. The language of the agreement will hardly bear a different construction. The plaintiffs by its terms were to deliver wheat *to be manufactured into flour*, which Willis *agreed to do*, *i. e.*, he agreed to manufacture the wheat so to be delivered into flour. But this provision would be entirely out of place in an exchange of wheat for flour. The plaintiffs were to furnish the barrels in which it was to be packed; thus providing every material for the completion of the work, and leaving nothing for Willis to do but to perform the proper labor of a manufacturer. The plaintiffs were moreover to have all the offals or feed, etc.; not such a quantity of offals as would proceed from a like quantity of other wheat, but *the* offals or feed, *i. e.*, such as should come of grinding the very wheat delivered to the miller, who was also to store the feed until the plaintiffs could sell it. And in case Willis performed on his part, *i. e.*, in case he manufactured the wheat so delivered into flour, with the requisite skill and prudence, the plaintiffs were to pay him at the rate of 16 cents, or in a certain contingency 18 cents per barrel, as a compensation for the labor of manufacture. Proper effect cannot be given to these provisions of the agreement, without treating it as a contract by the defendants to manufacture the plaintiffs' wheat into flour, to deliver to them the specific proceeds, at least to the extent mentioned in the contract, and to receive in satisfaction for the work the stipulated price per barrel. Contracts of this sort which have received a different construction will be found to have differed very materially from the present in their terms, as will be seen by a brief reference to the leading cases.

In *Buffum* v. *Merry*, 3 *Mason's Rep.* 478, the plaintiff owned 2,900 pounds of cotton yarn, and agreed to let one Hutchinson take it at the price of 65 cents per pound, and he was to pay the plaintiff the amount in plaids, at 15 cents per yard. H. was to use the plaintiff's yarn in making the warp of the plaids, and to use for filling, other yarn of as good a quality. Under this contract the yarn was delivered to H., who failed without having manufactured it into plaids, and assigned it with other property for the benefit of his creditors. The question was whether the property in the yarn passed to H. by the delivery; and Story, J., said that it did, holding that it was not a contract whereby the specific yarn was to be manufactured

into cloth, wholly for the plaintiff's account and at his expense, and nothing but his yarn was to be used for the purpose. That in such a case the property might not have changed; but here the cloth was to be made of other yarn as well as the plaintiff's. The whole cloth when made was not to be delivered to him, but so much only as at 15 cents per yard would pay for the plaintiff's yarn at 65 cents per pound. That this was a sale of the yarn at a specified price to be paid for in plaids at a specified price. (See also Story on Bailments, sec. 283; Jones on Bailments, p. 102.)

In *Ewing* v. *French*, 1 Blackford's (Ind.) Rep. 353, the plaintiff delivered a quantity of wheat to the defendants at their mill to be exchanged for flour. The wheat was thrown by the defendants into their common stock, and the mill was subsequently destroyed by fire. The court held this to be a contract of exchange, or a sale of the wheat to be paid for in flour; that from the moment the defendants received the wheat they became liable for the flour; that the wheat itself was not to be returned, nor the identical flour manufactured from it. And this was very well, for the contract was by its express terms, one of exchange.

In *Smith* v. *Clark*, 21 Wend. 83, one Hubbard owned a flouring mill, and the plaintiffs agreed with him to deliver wheat at his mill, and he agreed that for every four bushels and 55 pounds of wheat which should be received, he would deliver the plaintiffs one barrel of superfine flour, warranted to bear inspection. Here was nothing which imported a delivery of wheat for the purpose of being manufactured, nor any agreement to make it into flour and to receive a compensation for so doing, at a certain price per barrel; and it is obvious that Hubbard might have delivered any flour of the quality stipulated for, in satisfaction of the contract. Hence it was held that the delivery of the wheat under this agreement amounted to an exchange of the wheat for flour, and that Hubbard on receiving the wheat became indebted to the plaintiffs.

In *Norton* v. *Woodruff*, 2 Comst. 153, the defendant agreed to "*take*" wheat and to "*give*" them one barrel of superfine flour for every four bushels and thirty-six pounds of wheat; but here also there was the absence of a delivery for the purpose of being manufactured, no compensation was agreed to be given to the miller for his work, there was nothing about offals, and

nothing about the wheat owner's furnishing barrels in which to pack the flour. On the contrary, the miller in this case was to furnish the barrels. This court gave proper effect to the language of this contract by holding, that the miller by agreeing to *take* wheat and *give* flour in return, had bargained for an exchange of wheat for flour; that any flour of the quality described in the contract would have answered its requirements, and that the property of the wheat passed upon its delivery.

But in the case under review, Willis contracted to manufacture the wheat delivered, and to receive compensation for his labor. The flour, by which was intended the produce of the manufacture, was to be delivered to the plaintiffs in their own barrels, and the offals were to be kept in store as their property. These features give a character to this contract so materially different from that which is borne by the agreements which have received a judicial construction in the cases referred to, that with the fullest concurrence in the justice of those decisions, it may be held that the defendants were bailees and not purchasers of the plaintiff's wheat, and bound to restore its proceeds to them. I am, therefore, of opinion that the judgment of the supreme court ought to be affirmed.

Judgment affirmed.

[Concurring opinion by JEWETT, J., and dissenting opinions by BRONSON, Ch. J., and HARRIS, J., omitted.]

FOSTER v. PETTIBONE.

(7 New York, 433.—1852.)

THIS was an action of trespass brought to recover of the defendant, who was sheriff of Cayuga county, one hundred and ninety-three barrels of flour taken by him by virtue of a writ of replevin in favor of John G. Brown, from David S. Baker. Judgment was entered in favor of plaintiff upon the report of a referee, and this judgment was affirmed by the General Term of the Supreme Court.

The material facts were as follows: On the 25th of October, 1844, a contract was entered into between the plaintiff and

John G. Brown in the following form: "John G. Brown agrees to deliver to William C. Foster, at Rochester, thirty thousand bushels of wheat to be ground in season to be shipped east during navigation this fall, and fifteen thousand to be ground during the winter: said Brown is to be subject to no charge on account of storage; said Foster is to deliver to said Brown one barrel of superfine flour for each five bushels of wheat so delivered to be ground. The wheat to be received from Gelston & Evans, and the flour to be delivered to them."

The flour in question was a part of the flour manufactured from wheat delivered to the plaintiff under the contract and necessary to complete the amount to be returned in pursuance of it. After it was manufactured it was shipped by the plaintiff eastward upon the Erie canal, and the boat having been frozen in at Montezuma, the carrier had stored it with Baker, from whom the defendant took it upon a writ of replevin. It was shown that it required $4\frac{1}{2}$ bushels of wheat to make a barrel of flour.

RUGGLES, Ch. J. This controversy arises upon a contract in relation to wheat between a merchant and miller; and it is one of the many cases concerning the same subject-matter in which it is somewhat difficult to determine whether the parties intended to make a contract of sale or of bailment.

The distinction between a bailment and a sale is correctly laid down by Bronson, chief judge, in *Mallory* v. *Willis*, 4 Comst. 85, in these words: "When the identical thing delivered, although in an altered form, is to be restored, the contract is one of bailment and the title to the property is not changed; but when there is no obligation to restore the specific article, and the receiver is at liberty to restore another thing of equal value, he becomes a debtor to make the return, and the title to the property is changed: it is a sale."

The judges in that case differed with respect to the effect of the distinction upon the case before them, but not in regard to the distinction itself.

We will examine the contract in detail. In October, 1844, Brown agreed to deliver to Foster at Rochester, 30,000 bushels of wheat *to be ground*. These words, unless qualified and controlled by some subsequent grant of the agreement, show a bailment for manufacture and not a sale. They show what

was to be done with the wheat. If the contract operated as a sale, Foster might lawfully sell it again and immediately. But it was to be ground and not sold; and the words used by the parties control the power of Foster over the wheat and prevent him from selling it as his own property.

The contract proceeds: "Fifteen thousand bushels to be ground in season to be shipped east during the navigation this fall." What was to be shipped east? The only answer to be given to this question consistent with the language of the parties is, that it was the flour to be made of this 15,000 bushels of wheat. And if this part of the contract is obligatory on Foster, he was bound to return that identical flour for the purpose specified.

Why was the time fixed within which it was to be manufactured? If the transaction was a sale the time was immaterial, because Foster might have delivered other flour without having ground the wheat within the time, but if it was a bailment the time was material, and the parties deemed it material or they would not have fixed it by a stipulation in the contract. They contemplated a bailment therefore and not a sale.

The contract goes on thus: "And fifteen thousand to be ground during the winter." The same observations apply to this clause. Both these provisions are obligatory upon Foster; they bind him to grind the wheat within the specified times; and this was to be done for the benefit of Brown. But Brown could derive no benefit from the manufacture within the time, except to enable Foster to return him the flour to be made from the wheat; and if that was what the parties meant should be done, they intended a bailment and not a sale.

The next provision in the contract is this: "Said Brown to be subject to no charge on account of storage." If the parties had intended a sale, this clause was useless and senseless; because Foster could have no pretense for charging for the storage of his own wheat. But if they intended a bailment this provision was useful, effective and sensible. It secured Brown against a charge which Foster would otherwise have had a right to make. It is a legal maxim that any part of an instrument shall if possible be construed as having some effect. If we apply this maxim to the contract in question, we must regard the transaction as a bailment and not a sale.

There was this further provision in the contract: "The wheat

to be received from Gelston & Evans, and the flour to be *returned* to them." The import of this sentence is that the wheat received from Gelston & Evans should go back to them again in flour. The delivery to them of the flour of the same wheat would be a *return* of the same thing in a different form. The delivery of flour of other wheat would not be a *return* to Gelston & Evans, because it had never been in any form in their hands.

Every sentence in the contract has now been noticed excepting one, and every sentence thus noticed contains evidence that the parties intended a bailment and not a sale.

The part not yet noticed stands in the contract immediately after the clause in relation to storage; it is in these words: "Said Foster is to deliver to said Brown one barrel of superfine flour for each five bushels of wheat so delivered to be ground."

It is contended that Foster is not bound by this stipulation to return Brown or his agents the flour of the same wheat, but may perform his contract by the delivery of any other superfine flour, and therefore the transaction was a sale and not a bailment.

If the particular clause under consideration were to be considered and construed by itself and without reference to any other part of the contract, we should assent to the plaintiff's proposition; and according to the rule by which a sale is distinguished from a bailment, we should regard it as a sale, because Foster is not expressly and in terms bound in this clause to return flour of the same wheat. There are, however, even in this clause, words which make it doubtful whether the parties did not look to a return of that flour. The purpose for which the wheat was delivered, namely, "to be ground," is distinctly expressed in it; and if we are to understand it was to be ground *for Brown* (and that seems to be a natural and necessary interpretation), the parties must have regarded it as Brown's flour in Foster's hands as bailee. But it is a settled rule in the construction of contracts that the interpretation must be upon the entire instrument and not merely on disjointed or particular parts of it. The whole context is to be considered in collecting the intention of the parties, although the immediate object of inquiry be the meaning of an isolated clause. (Chitty on Contr. 83, and authorities cited). Here is a contract every sentence of which, excepting one, shows an intention to create a bailment

and not to make a sale. Even that one standing alone is ambiguous. It shows expressly that the wheat was delivered to be ground, and by implication that it was to be ground for Brown. It authorizes performance by a return of the flour made from the wheat received. It is not directly repugnant to the other parts of the contract, because it does not require performance by the delivery of flour made from other wheat. It must therefore be construed in subserviency to the intention to create a bailment which is so plainly manifested in all the other parts of the instrument, and the flour which Foster was bound to return was (although not expressly specified in the particular clause in question) the flour to be manufactured from the wheat received under the contract.

The judgment of the supreme court should be reversed and a new trial ordered.

GARDNER, JEWETT, JOHNSON, WATSON and WELLES, JJ., concurred. MORSE, J., dissented.

Judgment reversed and new trial ordered.

NORTON ET AL. v. WOODRUFF.

(2 New York, 153.—1849.)

The plaintiffs claimed to recover on the following contract:

"I agree to take all the wheat that Norton, Baker and Hall have at the storehouse of S. H. Cook, in Camillus, and also all the wheat they have at the storehouse of E. Shead, in Bellisle, and give them one barrel of first-rate superfine flour at my mill in Salina, for every $4\frac{36}{60}$ bushels of wheat. I am to take the wheat at the storehouses, and pack the flour in first-rate barrels, and warrant the flour to pass inspection in Albany or New York market for good superfine flour, one-half of the flour to be delivered on Friday of next week, and the balance on Friday of the week after, and as much sooner as I can make it. The wheat is to be of good merchantable quality.

"J. C. WOODRUFF.

"Salina, Oct. 2, 1845. NORTON, BAKER AND HALL."

It was proved that the quantities of wheat mentioned in the above contract amounted to 3,848 bushels, all of which was received into the defendant's mill, in pursuance of the contract, on the 6th and 8th days of October, 1845; that the defendant had on hand at the time about 4,000 bushels of other wheat of about the same quality as that received from the plaintiffs, and that on receiving the wheat in question the whole was mixed together. It also appeared that the wheat would make about one barrel of superfine flour to $4\frac{5}{6}\frac{5}{0}$ bushels of wheat; that the defendant's mill would grind about 100 barrels of flour per day besides ordinary custom work; that the defendant was in the habit of taking in wheat almost daily, none of which was kept separate; and that he supplied persons with whom he dealt with flour made from the common mass of wheat, including that received from the plaintiffs. On the 10th day of October, 1845, the defendant delivered to the plaintiffs 420 barrels of flour upon the aforesaid contract, and no more was ever delivered.

On the part of the defendant it was proved that on the night of the 12th of October, 1845, the mill accidentally took fire and was consumed, with all its contents, without any fault or negligence of the defendant. There was then in the mill about 4,000 bushels of wheat, including nearly 2,000 bushels of the wheat received from the plaintiffs, and about 150 barrels of flour packed.

The defendant insisted that the contract was one of bailment, and not of sale, and therefore that by the destruction of his mill and its contents without fault on his part, he was excused from delivering the residue of the flour. The circuit judge so held, and on that ground nonsuited the plaintiffs. The plaintiffs excepted, and moved in the supreme court for a new trial, which was granted. The defendant appealed to this court.

GARDNER, J., delivered the opinion of the court.

The only question necessary to be considered is, whether the terms of the contract taken in reference to the subject-matter and the situation of the parties, fairly import a sale or a bailment.

Neither the declarations nor the conduct of the defendant subsequent to the agreement, were admissible with a view to its

construction. Evidence of this character may be resorted to for the purpose of proving a contract, or the sense in which particular terms were used by the parties, and sometimes with a view to show a conversion of the property where a bailment has been previously established. Here, however, the contract is in writing. There is no such ambiguity in the terms as requires the aid of extrinsic testimony to explain them, and the rights of the parties must consequently be determined by its language.

It appears, then, by the contract, that the defendant agreed *to take* all the wheat of the plaintiffs at, etc., and *give* them one barrel of first rate superfine flour *for* every four bushels and fifty-six pounds of wheat of a good merchantable quality; the flour to be packed in first rate barrels and warranted to pass inspection in Albany and New York for good superfine flour. If the word "take" as it seems in this contract is equally applicable to a bailment as to a sale or exchange, and therefore equivocal, the term "give" requires some act of the defendant which should pass the property in the flour to the plaintiffs. As a word of contract, it demands something more than the redelivery of the plaintiff's wheat in the form of flour. It implies that the property in the thing to be given is in the donor until changed by delivery. The word does not impart a mere gratuity, since the defendant was to "give" superfine flour "for," that is, in consideration of, or as an equivalent for, the wheat taken by him from the plaintiffs.

There is nothing in the contract that expressly or by implication obliged the defendant to deliver to the plaintiffs flour manufactured from this wheat, or wheat of a similar quality, to the exclusion of any other in their possession, or which they might subsequently obtain. The agreement upon his part was satisfied by the delivery of a barrel of first rate superfine flour for every four bushels and fifty-six pounds of wheat received by him, whether manufactured at his mill or elsewhere, obtained by purchase or otherwise. This is a controlling circumstance to show that the parties intended a sale or exchange and not a bailment. The distinction between an obligation to restore the specific thing received, or of returning others of equal value, is the distinction between a bailment and a debt, so recognized by the decisions in England and this state, with the exception of *Seymour* v. *Brown*, 10 John. Rep. 44; Jones on Bailment, 102,

64; 7 Cowen, Rep. 756; *Smith* v. *Clarke*, 21 Wend. 84; *Dykers* v. *Allen*, 7 Hill, 498; 2 Kent, Com. 590. The decision in *Seymour* v. *Brown* has been overruled in the same court in which it was pronounced, and cannot, we think, be sustained either upon principle or authority. A new trial must be granted.

RUTHRAUFF v. HAGENBUCH.

(58 Pennsylvania St., 103.—1868.)

ASSUMPSIT to recover the price of a quantity of tobacco, which plaintiff alleged he had sold to defendant.

READ, J. The plaintiff raised a crop of tobacco on the land of the defendant in 1863, on the shares. It was gathered, stripped and stored in sheds on the farm of the defendant, and remained in the joint ownership of the plaintiff and defendant until the 18th of March, 1864, when they entered into the following agreement under seal:

"Agreement entered into March 18th, 1864, between Daniel S. Ruthrauff and Peter Hagenbuch, both of Union County, Pennsylvania, as follows, to wit: The said Ruthrauff hereby agrees to sell and doth sell unto the said Hagenbuch, in Turbut township, being the undivided half of all the tobacco said Ruthrauff raised on the said farm at fourteen cents per pound. The said tobacco being herein and hereby now delivered by said Ruthrauff to said Hagenbuch—and the said Hagenbuch hereby agrees to sell the said tobacco for the best price he can obtain for it—and whatever said Hagenbuch may obtain for said tobacco after paying all expenses for preparing the same for market and selling over and above the said sum of fourteen cents per pound he shall account for and pay to said Ruthrauff."

Upon this agreement are indorsed receipts for payments on the 4th of December, 1863, January, 1864, and March 18, 1864, amounting to $110.08.

The tobacco remained on the land and in the possession of the defendant until the 17th of March, 1865, when it was swept away by a flood, and the real question in this cause was what

is the true construction of this agreement, which of course was for the decision of the court.

The natural reading of this instrument would make the transaction a sale and delivery of the plaintiff's share of the tobacco to the defendant for a fixed price, to be increased but not to be diminished by the net proceeds of sale above that price, which could be fixed or made certain without difficulty. If this were a sale, then the defendant is liable to the plaintiff for the lost tobacco, and at the price of fourteen cents per pound, the flood having rendered impossible the performance of the latter part of the agreement, which therefore becomes simply a sale for a fixed price.

This is strongly corroborated by the receipts for money indorsed on the agreement, the last on the very day of its execution. The counsel for the defendant, it is true, states that the defendant was the creditor of the plaintiff; if so, it makes the sale more evident, because, if it were not so, the plaintiff would lose the tobacco and still remain liable to the defendant, supposing the defendant to have been his creditor to the full value of the tobacco, and if it is a bailment or trust, then the plaintiff is still liable for that amount, having lost the very tobacco which would be said, according to the defendant's theory, to be simply a trust or agency on the part of the defendant.

The court therefore erred in holding it not to be a sale, but a transfer in the nature of a trust, and that the defendant was a mere trustee, holding the tobacco for the benefit of the plaintiff.

We think it was a sale, and the court should have so instructed the jury.

Judgment reversed, and a venire de novo awarded.

HUNT v. WYMAN.[1]

(100 Massachusetts, 198.—1868.)

ACTION to recover the price of a horse.

On August 12, 1867, defendant looked at plaintiff's horse, and asked the price of the animal. Plaintiff named $250 as the price. Defendant said, "Let me take the horse and try it; if I do not like it, I will return it to-night in as good condition as I get it." Plaintiff assented, and defendant sent his servant for the horse, but, before it reached defendant's place, it escaped from his servant, ran away and was so severely injured that it could not be used or prudently removed. It did not appear that defendant's servant was at all at fault.

WELLS, J. Upon the facts stated in this case, there was a bailment and not a sale of the horse. The only contract, aside from the obligations implied by law, must be derived from the statement of the defendant, that, if the plaintiff "would let him take the horse and try it, if he did not like it he would return it in as good condition as he got it." This contract, it is true, is silent as to what was to take place if he should like it, or if he should not return it. It may perhaps be fairly inferred that the intent was that if he did like the horse he was to become the purchaser at the price named. But, even if that were expressed, the sale would not take effect until the defendant should determine the question of his liking. An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case the title will not pass

[1] BAILMENT WITH PRIVILEGE OF PURCHASE.—If a thing is transferred for the purpose of trial or inspection, upon the understanding that, if it prove satisfactory, the transferee will keep it and pay a certain price therefor, the transaction is a bailment until the transferee exercises his option, when it becomes a sale. Such a transaction should be distinguished from what is commonly called a "*sale and return*," where the agreement is for a present transfer of the absolute property in a thing for a price in money, or in money's worth, with the privilege of returning the same, if it prove unsatisfactory. In the former, the sale becomes complete and title passes upon the exercise of the option; in the latter, the title passes at the time of the contract, but the sale is subsequently rescinded upon the exercise of the option.

until the option is determined; in the other the property passes at once, subject to the right to rescind and return.

A mere failure to return the horse within the time agreed may be a breach of contract, upon which the plaintiff is entitled to an appropriate remedy; but has no such legal effect as to convert the bailment into a sale. It might be evidence of a determination, by the defendant, of his option to purchase. But it would be only evidence. In this case, the accident to the horse, before an opportunity was had for trial, in order to determine the option, deprives it of all force, even as evidence.

This action, being founded solely upon an alleged sale of the horse for an agreed price, cannot be maintained upon the evidence reported.

Exceptions overruled.

WHITEHEAD v. VANDERBILT.

(10 Daly, 214.—1881.)

J. F. DALY, J. The referee found as fact: That at the city of New York, in or about the month of May, 1878, the plaintiff loaned to the defendant, at the defendant's request, a bay mare, on the condition and agreement on the part of the defendant that he would return the said bay mare to the plaintiff in good condition in the fall of that year, unless he should then desire to purchase her—in which case, or in the event of his failure to return her in good condition, by reason of accident or otherwise, he should pay the plaintiff $2,500, her agreed value, and her market value in fact. That the mare thereafter, and in the month of July or August, 1878, sickened and died at Croton, New York, while still in the possession and control of the defendant, which rendered it impossible to return her as agreed. That the defendant has never paid the plaintiff any sum whatever for said mare. And the referee found as conclusions of law: That there is due from the defendant to the plaintiff $2,500, with interest thereon from the first day of January, 1879, and he should have judgment therefor and also for the costs of this action.

On the facts found the judgment should have been for de-

fendant. The defendant was bailee of the mare, with the privilege of purchasing her at the price of $2,500, and with the obligation to return her in good condition, in default of which he was also to pay $2,500 to plaintiff. He was not to be excused from returning her in good condition by reason of accident or otherwise. In the agreement thus made between the parties there was no provision for the contingency which actually occurred—the death of the mare before the time at which she was to be returned to her owner. The defendant had the whole period up to the fall to comply with his agreement to return her in good condition; he was prevented from doing so by her death in July or August; there is no finding and no presumption that her death was owing to his act or neglect; the performance of his contract became impossible by the act of God. Under such circumstances he is discharged from liability either as bailee or upon his special contract. (*Carpenter* v. *Stevens*, 12 Wend. 589; *Hyland* v. *Paul*, 33 Barb. 241; *Worth* v. *Edmonds*, 52 Barb. 40; *Wolfe* v. *Howes*, 20 N. Y. 197.) The contract to return the mare, or upon failure to return her in good condition to pay $2,500, does not make the defendant liable, as on special contract, in case of her death. In *McEvers* v. *Steamboat Sangamon*, 22 Mo. 187, which was an action to recover the value of a barge which plaintiff hired to defendant at $8.00 per day, the defendant agreeing to return her at any time and deliver her in *good condition*, the usual wear and tear excepted, and defendant answered that the barge had been destroyed by ice in the Mississippi river without any fault on defendant's part, the Supreme Court of Missouri reversed a judgment in favor of plaintiff, and Judge Larned, in his opinion, said: "If there had been no obligation on the boat for the return of the barge other than what the law implied upon the bailment, from the transaction itself, this defense, it is admitted, would have been sufficient. But it is insisted that here the party imposed the duty upon himself and therefore took the risk of such casualties; the distinction being between a duty imposed by law and one imposed by the parties themselves. . . . The question here, then, is, was this risk within the engagement of the defendant, so that no matter how the loss occurred, the party is bound; and we think it was not. Here is a general undertaking to return the property in good order, and it has perished without any fault on the part of the defendant, by a natural force that could not

be resisted, and we are of opinion that an undertaking to assume such a risk ought to be special and express, and so clear as not to admit of any other construction."

In *Keas* v. *Yewell*, 2 Dana, 249, where the action was on a bond to have two slaves forthcoming to answer any decree in a foreclosure of a mortgage upon them, it was set up in defense that one of the slaves had run away. Plaintiff had judgment, but it was reversed, the court saying: "The casualty by which the slave was lost is a peril incident to the very nature of such property, and therefore in contracts and covenants concerning such property that peril should never be presumed to have been intended to be guarded against unless so expressly stipulated."

In this case the death of the animal is a peril incident to such property, and if defendant is to be held to the onerous responsibility of that risk, his obligation to do so must be express, it cannot be implied. His agreement here was to return the mare in good condition or to pay $2,500. As his obligation goes to the *condition* of the animal at the time fixed for its return, the parties plainly contemplated her being in existence at that time, and they abstained from making provision in case of her death. It was also plain that the continued existence of the subject was essential to the performance of the contract, and if at the time fixed performance became impossible by the destruction of the thing without the fault of the party sought to be charged, he is not liable. (Anson on Contracts, 315–316; 12 Central Law Journal, 9.) The defendant was not an insurer of the mare. In *Field* v. *Brackett*, 56 Me. 121, it was held that a naked verbal promise to return in good order and at a specified time does not import a contract on the part of the hirer of a chattel to insure it against loss occurring without his default.

Judgment should be reversed and a new trial ordered, costs to abide event.

CHARLES P. DALY, Ch. J., and VAN HOESEN, J., concurred.

MELDRUM ET AL. v. SNOW.

(9 Pickering, 441.—1830.)

REPLEVIN by the plaintiffs, who are brewers in Boston, to recover of the defendant, a deputy of the sheriff of Suffolk, eighteen beer barrels, each containing about thirty gallons of beer, with their contents, being in the cellar recently occupied by one Klein, in Market street; which the plaintiffs aver to be their property, and that the defendant took and unlawfully detained the same on the 1st day of August, 1828.

The defendant pleaded as to the beer, that it was the property of Klein, and that he, the defendant, had attached it as such at the suit of Klein's creditors; to which the plaintiffs replied property in themselves, traversing Klein's ownership, and issue was joined thereon.

At the trial the plaintiffs proved that the beer was sent to Klein in the spring, he being a retailer of beer, and carrying on his business in the cellar where the beer was when it was attached by the defendant.

The plaintiffs also proved, that according to the usage of trade here, and in other places, the following are the terms upon which retailers are supplied by the brewers. In the spring, the brewer sends to the retailer such quantity as the retailer expects to vend, and at a stipulated price, and in barrels belonging to the brewer, which are returned to him when emptied. The retailer pays for all that he vends in the course of the season, at the price at which it was originally furnished. If the beer becomes sour or stale, or is lost by the bursting of the casks, or by fire or other casualty, the loss falls on the brewer. If any beer remains unsold at the end of the season, the retailer has a right to return it to the brewer, but the brewer has no right to take it without his consent. Payment is never made by the retailer in advance, but usually in annual or semi-annual settlements, when what has been sold is paid for and the residue is returned or remains a subject for future adjustment. The profits of retailing belong exclusively to the retailer, and all losses by bad debts fall upon him. The brewer's price of beer never varies. Beer cannot be drawn off nor removed in warm weather without injury and great danger of destroying it.

The plaintiffs also produced an instrument made and delivered to them by Klein on the first day of August, previously to the service of the writ, as follows: "Whereas I have always holden the beer, now in the cellar recently occupied by me, in the casks furnished by Meldrum & Co., as being of their property unless paid for, and the same being now attached by my creditors, ought of right, according to our contract, to be delivered up to them; therefore and for good and valuable considerations me thereto moving, I do hereby assign and transfer all my right, title and property therein, unto the said Meldrum & Co., they crediting me in account for what they thus receive."

Horton, the attesting witness to the assignment, testified that he went with the plaintiffs' clerk to the defendant, and that the clerk produced this instrument and demanded the beer and barrels, but the defendant refused to give them up.

The jury found a verdict for the defendant.

The plaintiffs moved for a new trial, because the judge instructed the jury, that the delivery of the beer, upon the terms of the custom proved, constituted a conditional sale to Klein, and vested in him the property in the beer, subject to attachment for his debts; whereas the plaintiffs contended, that such delivery vested only a special property in Klein for certain purposes; and that the general property remained in the plaintiffs; so that the beer could not be attached as the property of Klein; and that by virtue of the assignment to them of his special property, they became entitled to the immediate possession, and acquired the whole title, so that the detention by the defendant after demand made, was unlawful.

Per Curiam. The principal question in the case regards the ownership of the beer. Evidence was given at the trial, of a custom among brewers to supply retailers with beer in the manner stated in the report of the judge. It is argued that this mode of dealing is necessary, and it should seem to be so; for in general the retailer would not be able to purchase a large quantity of beer at once, and it appears that beer must be supplied to him in cold weather, as it cannot be removed in warm weather without injury. The question is, whether the beer is liable to attachment as the property of the retailer. The contract is very similar to that of sale or return in England; and in the case of some kinds of manufactures such a contract is

required, owing to particular circumstances which take them out of the rules of ordinary sales. It is on this ground that contracts of sale or return are held valid, and it is uniformly considered that in such contracts the property continues in the original owner; except in cases under the statute of James, of bankruptcy, which is not in force in this commonwealth.

It is objected, that in the contract of sale or return, the article is to be returned, unless sold, but that by the custom under consideration, it may or may not be returned, at the election of the retailer. We are not clear that there is any such distinction; nor is there good reason for it. It is consistent with the English law, that the beer shall remain the property of the brewer until the election of the retailer shall be made.

We place this contract on the same ground as that of sale or return in England, and we are glad to find authorities which sustain us; but without authorities we should deem it proper to uphold such a contract. Retailers who take beer to sell are often persons of very small property, and the custom appears to be so general and well known, that the retailer would not be supposed to be the owner of the beer; no injury therefore can arise to creditors of the retailer. And it being beneficial to the community to introduce the use of beer, public policy would justify us in favoring the custom.

It is asked, how shall the beer be attached; whether as the property of the brewer, or of the retailer. It is not necessary for us to answer this question. There are many cases where chattels cannot be attached as the property either of the general or of the special owner.

An objection is raised in regard to the possession of the plaintiffs in replevin, the possession and the right of possession being here in the retailer. It is sufficient to remark, that when the sale of beer is stopped by the acts of the retailer, his right to retain ceases; and further, in the case before us, the general property being in the brewer, and the retailer having assigned all his rights in the beer to him, the action may well lie.

New trial granted.

Dearborn v. Turner.

(16 Maine, 17.—1839.)

Trover for a cow and calf.

The plaintiff, being then the owner of the cow, on the 22d of April, 1836, delivered her to one Nason under the following agreement: "Monmouth, April 22, 1836; Rec'd of F. W. Dearborn, one four year old cow, and a calf by her side, which I promise to return to him in Augusta in one year from this date, with a calf by her side, or pay twenty-two dollars and fifty cents. Wm. H. Nason."

Within the year Nason, without the knowledge of the plaintiff, sold the cow to the defendant, who paid him therefor. The plaintiff, not being paid for the cow, and having found the cow, with a calf by her side, in the possession of the defendant, demanded the same, but the defendant refused to deliver them.

Weston, C. J. The plaintiff delivered to *Nason* a cow and calf, for which he took his written promise, to return the same cow within a year, with a calf by her side, or pay $22.50. We are very clear, that the security of the plaintiff vested in contract; and that *Nason*, having the alternative to return or pay, the property passed to him, and he was at liberty to sell the cow. *Tibbets* v. *Towle*, 3 Fairf. 341, was a very different case. There the plaintiff expressly reserved to himself the title to the oxen, until paid for. The case of *Hurd* v. *West*, 7 Cowen, 752, decides expressly, that where an alternative exists, the title to the property, in a case like this, is transferred upon the delivery.

Plaintiff nonsuit.

WESTCOTT v. THOMPSON ET AL.

(18 New York, 363.—1858.)

ACTION to recover sixty-seven ale barrels alleged to be wrongfully detained by defendants, who claimed to be owners, having purchased said barrels of one Ham or of persons who had made such purchase of him.

STRONG, J. The referee before whom this action was tried found, as matter of fact, that on the sale of the ale by the plaintiff to Ham it was agreed between them that Ham might retain the barrels until the ale was drawn and then the barrels should be returned to the plaintiff; but if any was not returned Ham should pay $2.00 each for them. The only question in the case upon the merits is, whether, under the agreement, Ham was authorized to sell the barrels. The counsel for the respondents claim, as the substance of the agreement, that the barrels were to be returned within a reasonable time after the ale was drawn out, or paid for at the rate mentioned. If this is a fair interpretation, the legal effect of the contract was, doubtless, as is insisted by him, to vest the title to the barrels in the purchaser of the ale. It was a sale of the barrels in connection with the ale, with the option in the purchaser of returning the barrels or keeping and paying for them. The plaintiff could not thereafter reclaim the barrels; all his dominion over them and right to them was gone, unless and until they should be returned in pursuance of the right of election in the purchaser. But there is a difficulty in adopting this construction, arising from the express provision in the contract, "that said barrels should be returned to the plaintiff," immediately preceding the clause fixing the amount to be paid for each barrel if they should not be returned. No force whatever is given by such a construction to that provision; and it is a sensible and established rule in the exposition of a contract, that effect must be given to every part, if reasonably practicable. We must therefore look for some other meaning—one having regard to each provision agreed on—and it is easy to find a plain one of that character. The barrels were to be returned, and if not returned $2.00 each to be paid for them; that

is, $2.00 should be paid for each barrel not returned; not surely $2.00 each for the whole number, if all should not be returned. Viewing the contract alone, the parties manifestly intended that the plaintiff should have the barrels again after the ale was drawn; but they contemplated the possibility that some of them might be lost or destroyed, and thereby the purchaser of the ale be unable to return all of them; and, in reference to that, further intended to fix a price to be paid as the value of each barrel which should not for that reason be redelivered to the plaintiff. This interpretation is still more apparent, if the evidence of the business of the parties to the contract be considered in connection with the terms of the contract, as may properly be done for the purpose of explanation, assuming the terms to be at all ambiguous as to their meaning. The plaintiff was largely engaged in the manufacture and sale of ale, which necessarily required a great many barrels, and it may reasonably be supposed that it was for his interest, after the ale sold by him from time to time should be consumed, that the barrels should be returned to him that he might refill and further use them in his business. They would be still more important on account of his having upon the barrels a brand or trade-mark by which his ale might be distinguished from that of other manufacturers. The other party to the contract purchased ale of the plaintiff extensively for sale, and sold it to others, receiving back from his customers the barrels when empty; and it is highly probable that it was for his interest to return the barrels to the plaintiff, rather than to purchase them. In view of the business and interests of the parties as aforesaid, it was quite natural that in the dealings between them they should provide for the redelivery to the plaintiff of the barrels, so far as could be done, and for the payment of a fixed sum, so far as they could not be returned by reason of losses or destruction, which could hardly fail sometimes to occur. The evidence of usage in similar cases, in the absence of an express contract —if it may be regarded in interpreting the agreement in question—also leads to a similar conclusion as to the true meaning of the agreement. But neither evidence of the business of the parties nor of usage could be received to contradict the agreement or control its legal operation. (*Wadsworth* v. *Alcott*, 2 Seld. 64; *Hinton* v. *Locke*, 5 Hill, 437.)

I lay out of view of the finding of the referee, as a fact, that

the parties understood it as above interpreted. The understanding of parties to a contract is to be learned from the terms of the contract, if plain and unambiguous; and when not so, from those terms with such explanatory facts as the law allows to be proved; and the question of what was their understanding, whether to be determined upon the face of the agreement alone, or upon extrinsic facts in connection with it, is always a question of law.

The judgment of the court below must be reversed and a new trial ordered.

All the judges concurring,

Judgment reversed and new trial ordered.

HERVEY ET AL. v. RHODE ISLAND LOCOMOTIVE WORKS.[1]

(93 United States, 664.—1876.)

ON THE 21st day of August, 1871, the Rhode Island Locomo-

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[1] SALE OR LEASE.—Personal property is some times transferred upon what is called the "instalment plan." The parties enter into a written agreement, in the form of a lease, whereby the transferee agrees to pay certain sums at stated times as "rent," and further agrees that the title shall remain in the owner until the last instalment has been paid, when title shall pass and the thing transferred become the property of the transferee. It seems to be the prevailing opinion to regard such transactions as conditional sales, and not leases, with retention of title in the vendor merely as security for the price.

The Lien Law in New York, Laws of 1897, ch. 418, art. IX., provides as follows in regard to contracts for the conditional sale of goods and chattels:

§ 110. Definitions.—The term "conditional vendor," when used in this article, means the person contracting to sell goods and chattels upon condition that the ownership thereof is to remain in such person, until such goods and chattels are fully paid for or until the occurrence of any future event or contingency; the term "conditional vendee," when so used, means the person to whom such goods and chattels are so sold.

§ 111. Conditional sale of railroad equipment and rolling stock.—Whenever any railroad equipment and rolling stock is sold, leased or loaned under a contract which provides that the title to such property, notwithstanding the use and possession thereof by the vendee, lessee or bailee, shall remain in the vendor, lessor or bailor, until the terms of the contract as to the payment of instalments, amounts or rentals payable, or the performance of other obligations thereunder, are fully complied with and that

tive Works as party of the first part, entered into the following contract with J. Edwin Conant & Co., as party of the second part:

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title to such property shall pass to the vendee, lessee or other bailee on full payment therefor, such contract shall be invalid as to any subsequent judgment creditor of or purchaser from such vendee, lessee or bailee for a valuable consideration, without notice, unless

1. Such contract is in writing, duly acknowledged and recorded in the book in which real estate mortgages are recorded in the office of the county clerk or register of the county in which is located the principal office or place of business of such vendee, lessee or bailee; and unless

2. Each locomotive or car so sold, leased or loaned, has the name of the vendor, lessor or bailor, or of the assignee of such vendor, lessor or bailor, plainly marked upon both sides thereof, followed by the word owner, lessor, bailor or assignee, as the case may be.

§ 112. Conditions and reservations in contracts for sale of goods and chattels.—Except as otherwise provided in this article, all conditions and reservations in a contract for the conditional sale of goods and chattels, accompanied by immediate delivery and continued possession of the thing contracted to be sold, to the effect that the ownership of such goods and chattels is to remain in the conditional vendor or in a person other than the conditional vendee, until they are paid for, or until the occurrence of a future event or contingency shall be void as against subsequent purchasers, pledgees or mortgagees in good faith, and as to them the sale shall be deemed absolute, unless such contract of sale, containing such conditions and reservations, or a true copy thereof be filed as directed in this article.

§ 113. Where contract to be filed.—Such contracts shall be filed in the city or town where the conditional vendee resides, if he resides within the state at the time of the execution thereof; and if not, in the city or town where such property is at such time. Such contract shall be filed, in the city of New York, in the office of the register of the city and county of New York; in the city of Brooklyn, in the office of the register of the county of Kings; in every other city or town of the state, in the office of the town clerk, unless there be a county clerk's office in the city or town, when it shall be filed in such office.

§ 114. Indorsement, entry, refiling and discharge of conditional contracts.—The provisions of the preceding article relating to chattel mortgages apply to the indorsement, entry, refiling and discharge of contracts for the conditional sale of goods and chattels. The officers with whom such contracts are filed shall enter the future contingency or event required to occur before the ownership of such goods and chattels shall pass from the vendor to the vendee, and the amount due upon such contract and the time when due. The name of the conditional vendor shall be entered in the column of "mortgagees" and the name of the conditional vendee in the column of "mortgagors." The officers performing services under this article are entitled to receive the same fees as for like services relating to chattel mortgages.

§ 115. Preceding sections not to apply to certain articles.—The preceding

"That whereas the said party of the first part is the owner of one locomotive-engine and tender complete, named Alfred N. Smyser, No. 3; and whereas the said party of the second part is desirous of using and eventually purchasing the same: now, therefore, in consideration of the sum of one dollar to the said party of the first part by the said party of the second part in hand paid, the receipt whereof is hereby acknowledged, and in consideration of the covenants and agreements hereinafter contained, the said party of the first part agrees to let and lease, and hereby does let and lease, to the said party of the second part, and the said party of the second part agrees to have and take from the said party of the first part, the said one locomotive-engine and tender, with the right to place the same upon its railroad, and to use the same in the usual manner in transacting the business of the said railroad; and in consideration thereof the said party of the second part agrees to pay to the said party of the first part for the use and rent of the same the sum of $12,093.96 in notes, as follows:

10% cash	$1,150.00
One note due Feb. 24, 1872 . . .	3,580.16
One " " May 24, 1872	3,647.90
One " " Aug. 24, 1872 . . .	3,715.90
	$12,093.96

"And the said party of the second part hereby further covenants and agrees, during the time hereby demised, to keep and maintain the said one locomotive-engine and tender in as good condition as it now is, reasonable and ordinary wear and tear excepted; but it is understood and agreed, that any injury by collision, by running off the track, or by fire, or by destruction from any cause, is not to be considered reasonable and ordinary wear and tear.

"And the said party of the first part, in consideration of the

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sections of this article do not apply to the conditional sale of household goods, pianos, organs, scales, butchers' and meat market tools and fixtures, wood cutting machinery, engines, dynamos, boilers, portable furnaces, boilers for heating purposes, threshing machines, horse powers, mowing machines, reapers, harvesters, grain drills and attachments, dairy sizes of centrifugal cream separators, coaches, hearses, carriages, buggies, phaetons and other vehicles, bicycles, tricycles and other devices for locomotion by human power, if the contract for the sale thereof is executed in duplicate, and one duplicate delivered to the purchaser.

foregoing, further covenants and agrees, that in case said party of the second part shall pay the said notes promptly, as hereinbefore set forth, upon payment of the last-mentioned note, viz., $3,715.90, and all renewals of same, it will grant, sell, assign, transfer, and convey to the said party of the second part the said one locomotive-engine and tender in the condition it then is, to have and to hold the same to the said party of the second part, its legal representatives, successors, and assigns forever. And the said party of the second part further covenants and agrees, that if it shall fail to make any of the said payments when due, then the said party of the first part shall be at liberty, and it shall be lawful for it, to enter upon and take possession of the said one locomotive-engine and tender, and to that end to enter upon the road and other property of said party of the second part.

"And the said party of the second part further covenants and agrees, that, in case of any default on its part in any of the payments, as hereinbefore provided, it will, within thirty days thereafter, deliver the said one locomotive-engine and tender to the said party of the first part.

"And the said party of the first part shall thereafter, upon thirty days' written notice to the said party of the second part of the times and place of sale, proceed to sell the said one locomotive-engine and tender, and shall apply the proceeds of such sales, first, to the payment of the expenses of the sale; second, to the payment of any balance then due, or thereafter to become due, for or on account of the rent, as hereinbefore provided; and, if after these payments there shall remain any balance of the proceeds of the sale, the same shall be paid to the said party of the second part.

"And the said party of the second part further covenants and agrees, that they will not in any way exercise or claim the right to release, incumber, or in any way dispose of said one locomotive-engine and tender, or employ them during the term of this lease in any other way than in the service of J. Edwin Conant & Co., contractors for the Chicago & Illinois Southern Railroad Company, or in any way or manner interfere with the said party of the first part in repossessing and retaking said one locomotive-engine and tender, should default be made in any of the hereinbefore provided for payments, but the full legal right and title of said one locomotive-engine and tender shall and does

remain in the Rhode Island Locomotive Works, as fully, to all intents and purposes, as though the lease had not been made.

"And the said party of the first part hereby covenants and agrees, that if the said party of the second part shall and do well and truly make each of the payments aforesaid at the times hereinbefore specified, without any let or hindrance or delay whatever as to any or either of said payments, that upon the last-mentioned payment, viz., $3,715.90, and all renewals being made, as well as each and all of the other said payments, the said party of the first part will and shall convey the said one locomotive-engine and tender to the said party of the second part, and give them a full acquittance for the same, and that the title thereto shall *ipso facto*, by the completion of such payment, vest in the said J. Edwin Conant & Co., contractors for the Chicago & Illinois Southern Railroad Company."

The above instrument was duly executed, and was recorded in the office of the clerk of Cumberland county, state of Illinois, on January 28, 1873, to which state said locomotive-engine and tender had been taken by Conant & Co., who, however, had paid no part of the principal, except the amount admitted on the face of the instrument.

The said engine and tender were seized under a writ of attachment, on or about October 28, 1871, against Conant & Co., and sold by the sheriff to Hervey, the plaintiff in error. On January 29, 1873, said engine and tender were seized under a writ of replevin sued out by the Rhode Island Locomotive Works against Hervey *et al.*

The circuit court rendered judgment for the plaintiff.

MR. JUSTICE DAVIS, delivered the opinion of the court.

It was decided by this court, in *Green* v. *Van Buskirk*, 5 Wall. 307, 7 id. 139, that the liability of property to be sold under legal process, issuing from the courts of the state where it is situated, must be determined by the law there, rather than that of the jurisdiction where the owner lives. These decisions rest on the ground that every state has the right to regulate the transfer of property within its limits, and that whoever sends property to it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides. He has no absolute right to have the transfer of property, lawful in

that jurisdiction, respected in the courts of the state where it is found, and it is only on a principle of comity that it is ever allowed. But this principle yields when the laws and policy of the latter state conflict with those of the former.

The policy of the law in Illinois will not permit the owner of personal property to sell it, either absolutely or conditionally, and still continue in possession of it. Possession is one of the strongest evidences of title to this class of property, and cannot be rightfully separated from the title, except in the manner pointed out by statute. The courts of Illinois say that to suffer without notice to the world the real ownership to be in one person, and the ostensible ownership in another, gives a false credit to the latter, and in this way works an injury to third persons. Accordingly, the actual owner of personal property creating an interest in another, to whom it is delivered, if desirous of preserving a lien on it, must comply with the provisions of the chattel mortgage act. R. S. Ill. 1874, 711, 712. It requires that the instrument of conveyance, if it have the effect to preserve a mortgage or lien on the property, must be recorded, whether the party to it be a resident or non-resident of the state. If this be not done, the instrument, so far as third persons are concerned, has no validity.

Secret liens which treat the vendor of personal property, who has delivered possession of it to the purchaser, as the owner until the payment of the purchase-money, cannot be maintained in Illinois. They are held to be constructively fraudulent as to creditors, and the property, so far as their rights are concerned, is considered as belonging to the purchaser holding the possession. *McCormick* v. *Hadden*, 37 Ill. 370; *Ketchum* v. *Watson*, 24 id. 591. Nor is the transaction changed by the agreement assuming the form of a lease. In determining the real character of a contract, courts will always look to its purpose, rather than to the name given to it by the parties. If that purpose be to give the vendor a lien on the property until payment in full of the purchase-money, it is liable to be defeated by creditors of the purchaser who is in possession of it. This was held in *Murch* v. *Wright*, 46 id. 488. In that case the purchaser took from the seller a piano at the price of $700. He paid $50.00 down, which was called rent for the first month, and agreed to pay, as rent, $50.00 each month, until the whole amount should be paid, when he was to own the piano. The court held, "That

it was a mere subterfuge to call this transaction a lease," and that it was a conditional sale, with the right of rescission on the part of the vendor, in case the purchaser should fail in payment of his instalments, — a contract legal and valid as between the parties, but subjecting the vendor to lose his lien in case the property, while in possession of the purchaser, should be levied upon by his creditors. That case and the one at bar are alike in all essential particulars.

The engine Smyser, the only subject of controversy in this suit, was sold on condition that each and all of the instalments should be regularly paid, with a right of rescission on the part of the vendor, in case of default in any of the specified payments.

It is true the instrument of conveyance purports to be a lease, and the sums stipulated to be paid are for rent; but this form was used to cover the real transaction, as much so as was the rent of the piano in *Murch* v. *Wright*, *supra*. There the price of the piano was to be paid in thirteen months, and here, that of the engine, $12,093.96, in one year. It was evidently not the intention that this large sum should be paid as rent for the mere use of the engine for one year. If so, why agree to sell and convey the full title on the payment of the last instalment? In both cases, the stipulated price of the property was to be paid in short instalments, and no words employed by the parties can have the effect of changing the true nature of the contracts. In the case at bar the agreement contemplated that the engine should be removed to the state of Illinois, and used by Conant & Co., in the prosecution of their business as constructors of a railroad. It was accordingly taken there and put to the use for which it was purchased; but while in the possession of Conant & Co., who exercised complete ownership over it, it was seized and sold, in the local courts of Illinois, as their property. These proceedings were valid in the jurisdiction where they took place, and must be respected by the Federal tribunals.

The Rhode Island Locomotive Works took the risk of losing its lien in case the property, while in the possession of Conant & Co., should be levied on by their creditors, and it cannot complain, as the laws of Illinois pointed out a way to preserve and perfect its lien.

By stipulation the judgment of the court below is affirmed as to the locomotive Olney, No. 1.

As to the locomotive and tender called Alfred N. Smyser, No. 3,

Judgment reversed.

Singer Manufacturing Co. v. Cole.

(4 Lea, 439.—1880.)

Freeman, J. This suit is brought on the following contract:

"Rent note. No salesman allowed to make any contract other than is printed or written on this note. Fifteen months after date, for value received, I promise to pay to the order of the Singer Manufacturing Company ninety-five dollars, for the rent of their sewing machine, with interest at ten per cent after maturity, and payable at Picketsville, Tennessee.

"It is agreed and understood between the makers, indorsers and payee of this note, that the Singer sewing machine number (giving it), for the use of which to the maturity of this note is given, is, and shall remain, the property of the Singer Manufacturing Company, and in default of payment, the said machine shall be returned to them or their agent in good order, and they or their agent are authorized to take possession of the same, without process of law. On payment of this and all other notes (given for the use of this machine) a bill of sale will be given, and title to same passed to lessee; but until then, the title to the machine shall remain in the Singer Sewing Machine Company.

"L. A. Senter.
"M. A. Senter."

The facts shown in the record are that L. A. Senter, an unmarried lady, purchased or bargained for the machine, which was delivered to her at the time of the execution of this instrument. She has since intermarried with defendant, W. P. Cole.

The Circuit judge charged the jury, following, we assume, a case from Minnesota, *Domestic Sewing Machine Company* v.

Anderson, 23 Minn. 57, that in case of a sale and delivery of personal property, an agreement by the purchaser to pay the vendor for the future use of the same, or to deliver it up to him on demand, is repugnant to the contract of sale, and is void. The receipt of the property by the purchaser furnishes no valid consideration for such an agreement. The idea that underlies his honor's view of the case is, that there was first a purchase, and then a renting of the machine purchased, and such seems to be the view of the Minnesota court.

This is not the fair construction of the contract, when we place ourselves in the situation of the parties, and take in all the circumstances of the case, as we may do to ascertain the meaning of the writing. It is true it is called a renting of the machine, but this is not the fact, nor true construction of the transaction. It was a sale of the machine, with a reservation of the title to the company, as security for payment of the price. The fact that it is called a renting does not make it so. In order to make it a renting of a purchased machine, we must say it was sold for nothing, and then rented to the purchaser by the vendor for fifteen months for $95.00, this being the only sum ever agreed to be paid. This would be absurd. However reprehensible and calculated to excite suspicion of unfairness this contract may appear, with its verbiage expressing literally a different meaning from what was intended, or was the truth of the case, we do not think proper to follow the technical view of the opinion referred to, and hold the contract void. The party has undertaken to pay $95.00, in terms for rent, but in fact for the purchase of the machine, and is bound, as we can see from this record, to meet the obligation contracted.

Without further discussion, let the judgment be reversed, and the case be remanded for a new trial.

Loomis v. Bragg.

(50 Connecticut, 228.—1882.)

Park, C. J. This suit grows out of the following contract between the parties:

"Agreement between C. M. Loomis of New Haven, Conn., and James D. Bragg of Bridgeport, Conn. Said Loomis agrees to rent, and said Bragg agrees to hire, one Albert W. Ladd & Co. piano, No. 1807, price $140 (cash $5, balance $135), for the term of twenty-seven months from the fifth day of January, 1881, at the rent of $5 per month, payable on the fifth day of each month, in advance. And it is agreed that if the rent and interest shall be paid punctually according to agreement, said instrument shall be the property of said Bragg at the end of said term. And further, if said Bragg shall neglect to pay the rent and interest falling due at any time, said Loomis shall be at liberty to enter the dwelling house or premises where said instrument may be, and take said instrument into his possession, and the money already paid shall belong to said Loomis. And said Bragg is held responsible for all damages, except the usual wear and tear, and to pay all taxes and insurance on said instrument. The same is not to be removed from the place of delivery without permission from said Loomis. Dated at Bridgeport, Jan. 5, 1881."

The instrument was delivered by the plaintiff, and monthly installments were paid by the defendant under the contract up to the month of May of the same year, when the defendant made default of payment, and continued to do so till the month of October following, when he absolutely refused to go further under the contract, and notified the plaintiff to remove the piano, which was done. During the time that default of payment was being made, the defendant orally renewed his original promise whenever a payment became due, and in consequence of this the plaintiff suffered the piano to remain in his possession notwithstanding the default.

These facts are set forth in the plaintiff's complaint, to which the defendant demurred; and the question is, do they sustain the claim for damages made in the first count of the complaint?

Or do they support the second count, which claims a reasonable sum as compensation for the use of the piano during the time, not covered by his payments, that the defendant had the use of it? Or do they sustain the plaintiff's claim that the defendant shall pay the unpaid installments provided for in the contract as set forth in the third and last count?

The contract upon which the complaint is based purports to be a renting of the piano for the term of twenty-seven months at the rate of $5.00 per month, but in fact it is an agreement to sell the piano at the end of twenty-seven months, when the sum of $135 shall have been paid in monthly installments of $5.00 each, together with certain interest, upon condition that if at any time the defendant shall make default of payment when any installment or the interest upon the unpaid balance shall become due, the plaintiff shall have the right to rescind the contract, and take the piano back into his possession, and that whatever sums shall have been paid shall become the property of the plaintiff. The contract is similar in all essential respects to that in the case of *Hine* v. *Roberts*, 48 Conn. 267; *S. C.* 40 Am. Rep. 170; the only difference being that in that case a melodeon, valued at the sum of $50.00, and a note for $140, payable at a future day, were given for what the contract termed rent. The court held the contract to be an agreement for the sale of the organ when the contract price for it should have been paid. So here, the terms of this contract are inconsistent with those of a lease, but are consistent with those of a conditional sale. The sum to be paid is the entire present value of the piano, that is $140. That sum, with the interest, is to be paid in a little more than two years, when the instrument would be nearly as valuable as it was at the outset. It is incredible that the defendant would be willing to pay as rent the entire value of the instrument in so short a time, or that the plaintiff would be rapacious enough to demand it. Indeed the fact that the piano was by the contract to be the defendant's when the amount should be paid, shows decisively that the monthly sums were to be paid, not as rent, but as the purchase price. Furthermore, it was thought important by the plaintiff that it should be provided that if the defendant should at any time fail to pay the stipulated sums when due, he should lose the piano, and that all that had been paid should belong to

the plaintiff. There was no necessity for this if the contract was a lease of the property.

We think it clear that the parties stipulated for a conditional sale of the piano, leaving the sale to be consummated in the future when the purchase price should be paid. The plaintiff had the instrument to sell. The defendant desired to purchase it, but was unable to pay the entire price on the delivery of the property. The plaintiff was unwilling to give credit. So the arrangement under consideration was made, by which the plaintiff was enabled to accomplish his object by a conditional sale and be safe, and the defendant to have the use of the piano, and pay for it in small sums, at stated times, according to his ability.

Such was the contract; and we are now to consider the rights of the parties under it. The defendant failed to perform it. He made default of payment after having paid a number of installments. The contract provides for this contingency, by a forfeiture of all the defendant's rights under the contract, and of the sums of money that had been paid. This was considered sufficient protection by the plaintiff when he entered into the agreement, for he provided nothing further. The installments were to be paid monthly. They exceeded in value the use of the piano for the same time. Surely the plaintiff was thoroughly protected. Had he exercised his rights when the defendant made his first default in the month of May, this controversy would never have arisen. He would have had no cause to complain. But it is said that he indulged the defendant on his promises to pay the installments in arrear, till the month of October, although he continued to make default during the time; and it is claimed that this gives him the right to recover damages for a breach of the contract; or the fair value of the use of the piano during that period; or the installments remaining unpaid.

It is not pretended that the defendant was guilty of fraud in making the promises. It must be taken that they were made in good faith, for the contrary is not alleged. Do they alter the case? They were merely the repetition of what the contract stated. The defendant in it promised to pay all the installments as they should become due. Can a repetition make the promise stronger? The original promise is sufficient to make the defendant pay if he can be made to pay at all. Besides this, there is no consideration alleged for the new promises. Had the com-

plaint set forth that when each default was made the plaintiff was about to exercise his rights under the contract by claiming a forfeiture, when the defendant proposed that if the plaintiff would forego his rights he would pay the overdue installment, and the plaintiff so agreed and granted the indulgence, and in consideration thereof the defendant made the promise, a different case would have been presented. There would have been something more than a repetition of the original promise. But nothing appears in the complaint beyond the fact that the defendant made the promises, and the plaintiff, relying upon them, left the piano in his possession. For aught that appears nothing was said by the plaintiff to the defendant to induce him to make the promises. It does not appear that he made any disclosure of what he intended to do. Consequently the promises are left wholly without consideration.

We think therefore that the demurrer was well taken to the first count of the plaintiff's complaint, for the reason that the plaintiff's remedy is set forth in the contract. He should have reclaimed his piano on the first default. Indeed the defendant had the option by the contract at any time to surrender the piano and lose the installments he had paid. There could be therefore no claim for damages other than the installments, which the plaintiff already had.

We think also that the demurrer was well taken to the second count, for the reason that the defendant held the piano under a special contract, which continued in force until it was surrendered in the month of October, and therefore there could be no implied agreement. And for the same reasons we think the demurrer was well taken to the third count.

There is no error in the judgment appealed from.

Judgment affirmed.

In this opinion the other judges concurred.

Chattel Mortgages.

At common law a mortgage of personal property is regarded as a conditional sale, made to secure the payment of a debt, title passing to the mortgagee, subject to the condition that the sale shall be void and the title shall revert to the mortgagor on payment of the debt. It differs from the ordinary conditional sale in that, after condition broken, the mortgagor has the right or equity of redemption, *i. e.*, the right to recover the property mortgaged on payment of the full amount of the debt within a reasonable time after default.

The provisions of the Lien Law of New York, Laws of 1897, ch. 418, art. VIII., applicable to chattel mortgages, are as follows:

Section 90. Chattel mortgage to be filed.—Every mortgage or conveyance intended to operate as a mortgage of goods and chattels, or of any canal boat, steam tug, scow or other craft, or the appurtenances thereto, navigating the canals of the state, which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, is absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, is filed as directed in this article.

§ 91. Corporate mortgages against real and personal property.—Mortgages creating a lien upon real and personal property, executed by a corporation as security for the payment of bonds issued by such corporation, or by any telegraph, telephone or electric light corporation, and recorded as a mortgage of real property in each county where such property is located or through which the line of such telegraph, telephone or electric light corporation runs, need not be filed or refiled as chattel mortgages.

§ 92. Where filed.—An instrument, or a true copy thereof, if intended to operate as a mortgage of a canal boat, steam tug, scow or other craft, or of the appurtenances thereto, navigating the canals of this state, must be filed in the office of the comptroller, and need not be filed elsewhere. Every other chattel mortgage, or an instrument intended to operate as such, or a

true copy thereof, must be filed in the town or city where the mortgagor, if a resident of the state, resides at the time of the execution thereof, and if not a resident, in the city or town where the property mortgaged is, at the time of the execution of the mortgage. If there is more than one mortgagor, the mortgage, or a certified copy thereof, must be filed in each city or town within the state where each mortgagor resides at the time of the execution thereof. In the city of New York, such instrument must be filed in the office of the register of the city and county of New York; in the city of Brooklyn, in the office of the register of the county of Kings, and in every other city or town of the state, in the office of the city or town clerk, unless there is a county clerk's office in such city or town, in which case it must be filed therein.

§ 93. Filing and entry.—Such officers shall file every such instrument presented to them for that purpose, and indorse thereon its number and the time of its receipt. They shall enter in a book, provided for that purpose, in separate columns, the names of all the parties to each mortgage so filed, arranged in alphabetical order, under the head of "mortgagors" and "mortgagees," the number of such mortgage or copy, its date, the amount secured thereby, when due, the date of the filing thereof; and, if the mortgage be upon a craft navigating the canals, and filed in the office of the comptroller, the name of the craft shall also be inserted.

§ 94. Fees.—The several clerks and registers are entitled to receive for services hereunder, the following fees: For filing each instrument, or copy, six cents; for entering the same as aforesaid, six cents; for searching for each paper, six cents; and the like fees for certified copies of such instruments or copies as are allowed by law to clerks of counties for copies and certificates of records kept by them. The comptroller is entitled to receive the following fees for services performed under this article, for the use of the state: For filing each instrument or copy and entering the same, twenty-five cents; for searching for each paper, twenty-five cents; and the like fees for certified copies of such instruments or copies, as are allowed by law to be charged by the comptroller for copies and certificates of records kept in his office. No officer is required to file or enter any such paper or furnish a copy thereof, until his lawful fees are paid.

§ 95. Mortgage invalid after one year, unless statement is filed.—A chattel mortgage, except as otherwise provided in this article, shall be invalid as against creditors of the mortgagor, and against subsequent purchasers or mortgagees in good faith, after the expiration of the first or any succeeding term of one year, reckoning from the time of the first filing, unless,

1. Within thirty days next preceding the expiration of each such term, a statement containing a description of such mortgage, the names of the parties, the time when and place where filed, the interest of the mortgagee or of any person who has succeeded to his interest in the property claimed by virtue thereof, or

2. A copy of such mortgage and its endorsements, together with a statement attached thereto or endorsed thereon, showing the interest of the mortgagee or of any person who has succeeded to his interest in the mortgage, is filed in the proper office in the city or town where the mortgagor then resides, if he is then a resident of the town or city where the mortgage or a copy thereof or such statement was last filed; if not such resident, but a resident of the state, a true copy of such mortgage, together with such statement, shall be filed in the proper office of the town or city where he then resides; and if not a resident of the state, then in the proper office of the city or town where the property so mortgaged was at the time of the execution of the mortgage.

§ 96. Duration of lien of mortgage on canal craft.—Every mortgage upon a canal boat or other craft navigating the canals of this state, filed as provided in this article, shall be valid as against the creditors of the mortgagor and against subsequent purchasers or mortgagees in good faith, as long as the debt which the mortgage secures, is enforcible. From the time of filing, every such mortgage shall have preference and priority over all other claims and liens, not existing at the time of such filing.

§ 97. Copies to be evidence of certain facts.—A copy of any such original instrument, or of a copy thereof, including any statement relating thereto, certified by the officer with whom the same is filed, may be received in evidence, but only of the fact that such instrument, or copy, or statement was received and filed according to the endorsement thereon; and the origi-

nal endorsement upon such instrument or copy may be received in evidence only of the facts stated in such endorsement.

§ 98. Mortgage, how discharged of record.—Upon the payment or satisfaction of a chattel mortgage, the mortgagee, his assignee or legal representative, upon the request of the mortgagor or of any person interested in the mortgaged property, must sign and acknowledge a certificate setting forth such payment or satisfaction. The officer with whom the mortgage, or a copy thereof is filed, must, on receipt of such certificate, file the same in his office, and write the word "discharged" in the book where the mortgage is entered, opposite the entry thereof, and the mortgage is thereby discharged.

Part II.

SALES UNDER THE STATUTE OF FRAUDS.

The Statute of Frauds.

Oral or written contracts for the sale of personal property, *to any amount*, were recognized and enforceable at common law. All that was required was proof of an agreement to transfer the absolute property from the vendor to the vendee for a price in money. The statute of 29 Chas. II., c. 3, commonly called the Statute of Frauds, introduced an important modification of the common law in this regard, by providing that, "No contract for the sale of any goods, wares, and merchandises for the *price* of £ 10 sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part-payment, or that some note or memorandum in writing of the said bargain, be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." Browne on the Statute of Frauds (3d. ed.), 504.

After the passage of this act, some English decisions held that the seventeenth section of the statute included contracts of "bargain and sale," but excluded executory agreements to sell; others, that such executory agreements were also within the statute.

In 1828, the statute of 9 Geo. IV., c. 14, commonly called Lord Tenterden's Act, aimed to settle the controversy by enacting that the provisions of the seventeenth section of the Statute of Frauds "shall extend to all contracts for the sale of goods of the *value* of ten pounds sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering

the same fit for delivery." Browne on the Statute of Frauds (3d. ed.), 505.

The provisions of the English statute have been substantially re-enacted, with slight changes, in almost all of the states of the United States.

The provisions of the New York Statute (R. S., Part II., ch. 7, tit. II., repealed, however, by the Personal Property Law of 1897) were as follows:

"Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void, unless,

"1. A note or memorandum of such contract, be made in writing, and be subscribed by the parties to be charged thereby:[1] or,

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[1] Under 1 R. S. *136, § 3, the note or memorandum was required to be "subscribed *by the parties* to be charged thereby." In *Justice* v. *Lang*, 42 N. Y. 493, 500, Lott, J., says: "It is claimed by the defendants, and it was so held by the General Term, that the omission of the plaintiff to subscribe the contract rendered it void, even as to the defendants, by whom it was subscribed, and consequently that it was wholly inoperative and ineffectual for any purpose or to any extent whatever. Is this the proper construction of the statutory provision?

"In deciding this question it is important to consider the object of the statute. That is declared in the act of 26th February, 1787. It is entitled 'An act for the prevention of frauds;' and after making several enactments, it enacts (as stated in the beginning of section 9) 'for the prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury and subornation of perjury,' several provisions, and, among others, the fifteenth section [that the note or memorandum must be '*signed* by the parties to be charged by such contract'] above cited.

"The present statute on the subject is confessedly for the same purpose. The enactment that every contract for the sale of any goods for the price of fifty dollars or more, where the buyer neither accepts or receives a part of them, nor at the time pays some part of the purchase-money, shall be *void* 'unless a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby,' does not make such a contract *unlawful*, but its object is to declare that it shall be of no binding force to charge any party who has not subscribed a note or memorandum thereof in writing, with any liability thereon. It evidently contemplates legal proceedings against one of the parties to it, and its design is to prevent perjury and subornation of perjury, by refusing the aid of the law in the enforcement of any rights claimed under it against him, without such written evidence.

"The end and object of the statute are attained by written proof of the obligation of the defendant; he is the party to be charged with a liability, dependent on, and resulting from, the evidence, and he is intended to be

"2. Unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action: or,

"3. Unless the buyer shall, at the time, pay some part of the purchase money."

The same statute also provided that, "whenever goods shall be sold at public auction, and the auctioneer shall, at the time of sale, enter in a sale book, a memorandum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person on whose account the sale is made, such memorandum shall be deemed a note of the contract of sale, within the meaning of the last section," and that, "every instrument required by any of the provisions of this title, to be subscribed by any party, may be subscribed by the lawful agent of such party."

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protected against the dangers of false oral testimony. To say that the plaintiff or the party seeking to enforce a contract is himself a party to be *charged* therewith is a perversion of language.

"The term 'parties' in the section quoted is used in connection with the words '*to be charged* thereby,' and does not necessarily include, nor can it be construed to include, *all* the parties to the contract. It is, on the contrary, limited and restricted, by the qualifying words, to such only of those parties as are to be bound or held chargeable and legally responsible on the contract, or on account of a liability created by or resulting from it.

"If it had been intended to extend to, and include, all of the parties, those words 'to be charged thereby' would have been unnecessary and superfluous. The appropriate language to express such intention would have been, that the note or memorandum should be subscribed 'by all the parties thereto,' or some general terms, without any limitation or restriction to any particular class or designation of parties.

"The action of the legislature, moreover, when considered in connection with the recommendation of the revisers, is in harmony with and strongly confirmatory of this construction. That recommendation was, that the note or memorandum should be subscribed by *all the parties* thereto; and if it had been adopted there would have been no room for doubting as to the intent of the requirement. So, on the other hand, the omission to make the change recommended, and the enactment of the provision by the continuance of the phraseology and terms, 'the parties to be charged thereby,' clearly indicate that the construction that had been given thereto in numerous cases, declaring that it was enough that the note or memorandum of the contract be signed or subscribed by the party to be charged, was expressive of the true meaning of those terms."

In the present Personal Property Law (N. Y. Laws of 1897, ch. 417, § 21), "party" has been substituted for "parties," making it now even more clear that it is not the intention of the legislature to require the note or memorandum to be subscribed by *all* the parties to the contract, but only "by the *party* to be charged therewith."

The Personal Property Law, Laws of 1897, chapter 417, which went into effect on the first day of October, 1897, provides that, "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking; . . .

"Is a contract for the sale of any goods, chattels or things in action for the price of fifty dollars or more, and the buyer does not accept and receive part of such goods, or the evidences, or some of them, of such things in action; nor at the time, pay any part of the purchase money.

"If goods be sold at public auction, and the auctioneer at the time of the sale, enters in a sale book, a memorandum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person on whose account the sale was made, such memorandum is equivalent in effect to a note of the contract or sale, subscribed by the party to be charged therewith."

Lee v. Griffin.

(1 Best & Smith, 272.—1861.)

Declaration against the defendant, as the executor of one Frances P., for goods bargained and sold, goods sold and delivered, and for work and labor done and materials provided by the plaintiff as a surgeon-dentist for the said Frances P.

Plea, that the said Frances P. never was indebted as alleged.

The action was brought to recover the sum of £21 for two sets of artificial teeth ordered by the deceased.

At the trial, . . . , it was proved by the plaintiff that he had, in pursuance of an order from the deceased, prepared a model of her mouth and made two sets of artificial teeth; as soon as they were ready he wrote a letter to the deceased, requesting her to appoint a day when he could see her for the purpose of fitting them. To this communication the deceased replied as follows:

"*My dear Sir*,—I regret, after your kind effort to oblige me,

my health will prevent my taking advantage of the early day. I fear I may not be able for some days.

"Yours, &c.,

"FRANCES P."

Shortly after writing the above letter, Frances P. died. On these facts the defendant's counsel contended that the plaintiff ought to be nonsuited, on the ground that there was no evidence of a delivery and acceptance of the goods by the deceased, nor any memorandum in writing of a contract within the meaning of the 17th section of the Statute of Frauds, 29 Car. 2, c. 3, and the learned judge was of that opinion. The plaintiff's counsel then contended that, on the authority of *Clay* v. *Yates*, 1 H. & N. 73, the plaintiff could recover in the action on the count for work and labor done, and materials provided. The learned judge declined to nonsuit, and directed a verdict for the amount claimed to be entered for the plaintiff, with leave to the defendant to move to enter a nonsuit or verdict.

CROMPTON, J. I think that this rule ought to be made absolute. On the second point I am of the same opinion as I was at the trial. There is not any sufficient memorandum in writing of a contract to satisfy the Statute of Frauds. The case decided in the House of Lords, to which reference has been made during the argument, is clearly distinguishable. That case only decided that if a document, which is silent as to the particulars of a contract, refers to another document which contains such particulars, parol evidence is admissible for the purpose of showing what document is referred to. Assuming, in this case, that the two documents were sufficiently connected, still there would not be any sufficient evidence of the contract. The contract in question was to deliver some particular teeth to be made in a particular way, but these letters do not refer to any particular bargain, nor in any manner disclose its terms.

The main question which arose at the trial was, whether the contract in the second count could be treated as one for work and labor, or whether it was a contract for goods sold and delivered. The distinction between these two causes of action is sometimes very fine; but where the contract is for a chattel to be made and delivered, it clearly is a contract for the sale of goods. There are some cases in which the supply of the materials is ancillary to the contract, as in the case of a printer

supplying the paper on which a book is printed. In such a case an action might perhaps be brought for work and labor done and materials provided, as it could hardly be said that the subject-matter of the contract was the sale of a chattel: perhaps it is more in the nature of a contract merely to exercise skill and labor. *Clay* v. *Yates*, 1 H. & N. 73, turned on its own peculiar circumstances. I entertained some doubt as to the correctness of that decision; but I certainly do not agree to the proposition that the value of the skill and labor, as compared to that of the material supplied, is a criterion by which to decide whether the contract be for work and labor or for the sale of the chattel. Here, however, the subject-matter of the contract was the supply of goods. The case bears a strong resemblance to that of a tailor supplying a coat, the measurement of the mouth and fitting of the teeth being analogous to the measurement and fitting of the garment.

HILL, J. I am of the same opinion. I think that the decision in *Clay* v. *Yates*, 1 H. & N. 73, is perfectly right. That was not a case in which a party ordered a chattel of another which was afterwards to be made and delivered, but a case in which the subject-matter of the contract was the exercise of skill and labor. Wherever a contract is entered into for the manufacture of a chattel, there the subject-matter of the contract is the sale and delivery of the chattel, and the party supplying it cannot recover for work and labor. *Atkinson* v. *Bell*, 8 B. & C. 277, is, in my opinion, good law, with the exception of the dictum of Bayley, J., which is repudiated by Maule, J., in *Grafton* v. *Armitage*, 2 C. B. 339, where he says: "In order to sustain a count for work and labor, it is not necessary that the work and labor should be performed upon materials that are the property of the plaintiff [*defendant*]." And Tindal, C. J., in his judgment in the same case, page 340, points out that in the application of the observations of Bayley, J., regard must be had to the particular facts of the case. In every other respect, therefore, the case of *Atkinson* v. *Bell* is law. I think that these authorities are a complete answer to the point taken at the trial on behalf of the plaintiff.

When, however, the facts of this case are looked at, I cannot see how, wholly irrespective of the question arising under the Statute of Frauds, this action can be maintained. The contract

entered into by the plaintiff with the deceased was to supply two sets of teeth, which were to be made for her and fitted to her mouth, and then to be paid for. Through no default on her part, she having died, they never were fitted; no action can therefore be brought by the plaintiff.

BLACKBURN, J. On the second point, I am of opinion that the letter is not a sufficient memorandum in writing to take the case out of the Statute of Frauds.

On the other point, the question is whether the contract was one for the sale of goods or for work and labor. I think that in all cases, in order to ascertain whether the action ought to be brought for goods sold and delivered, or for work and labor done and materials provided, we must look at the particular contract entered into between the parties. If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labor; but, if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered. . . In *Atkinson* v. *Bell*, 8 B. & C. 277, the contract, if carried out, would have resulted in the sale of a chattel. In *Grafton* v. *Armitage*, 2 C. B. 340, Tindal, C. J., lays down this very principle. He draws a distinction between the cases of *Atkinson* v. *Bell* and that before him. The reason he gives is that, in the former case, "the substance of the contract was goods to be sold and delivered by the one party to the other;" in the latter "there never was any intention to make anything that could properly become the subject of an action for goods sold and delivered." I think that distinction reconciles those two cases, and the decision of *Clay* v. *Yates*, 1 H. & N. 73, is not inconsistent with them. In the present case the contract was to deliver a thing which, when completed, would have resulted in the sale of a chattel; in other words, the substance of the contract was for goods sold and delivered. I do not think that the test to apply to these cases is whether the value of the work exceeds that of the materials used in its execution; for, if a sculptor were employed to execute a work of art, greatly as his skill and labor, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would, in my opinion, nevertheless be a contract for the sale of a chattel.

Rule absolute.

PARSONS ET AL. v. LOUCKS ET AL.

(48 New York, 17.—1871.)

ACTION to recover damages for a breach of contract for the manufacture and delivery of 20,000 pounds of paper. Judgment was entered in favor of plaintiffs and was affirmed by the General Term of the Superior Court of the city of New York.

On October 30, 1862, defendants agreed to manufacture and deliver to plaintiffs 20,000 pounds of paper, for which plaintiffs agreed to pay 13 cents per pound, less 5 per cent discount. In January, 1863, defendants refused to perform their part of the agreement.

HUNT, C. The paper to be delivered was not in existence at the time of the making of the contract in October, 1862. It was yet to be brought into existence by the labor and the science of the defendants. Of the 20,000 pounds to be delivered, not an ounce had then been manufactured. It was all of it to be created by the defendants and at their mill. In such a case it is well settled that the statute of frauds does not apply to the contract. The distinction is between the sale of goods in existence, at the time of making the contract, and an agreement to manufacture goods. The former is within the prohibition of the statute, and void unless it is in writing, or there has been a delivery of a portion of the goods sold or a payment of the purchase-price. The latter is not. The statute reads, "every contract *for the sale* of any goods, chattels or things in action, for the price of fifty dollars or more, shall be void unless," etc. (2 R. S. 136, § 3.) The statute alludes to a *sale* of goods, assuming that the articles are already in existence. This distinction was settled in this state in 1820, by the case of *Crookshank* v. *Burrell*, 18 John. R. 58, and has been followed and recognized in many others. (*Sewell* v. *Fitch*, 8 Cowen, 215; *Robertson* v. *Vaughan*, 5 Sand. S. C. R. 1; *Bronson* v. *Wiman*, 10 Barb. 406; *Donovan* v. *Willson*, 26 id. 138; *Parker* v. *Schenck*, 28 id. 38; *Mead* v. *Case*, 33 id. 202; *Smith* v. *N. Y. Central R. R.*, 4 Keyes, 194.)

The present is not one of the border cases, in which an em-

barrassing or doubtful question is presented, as where wheat is sold, but the labor of threshing remains to be done (*Downs* v. *Ross*, 23 Wend. 270), or a sale of flour which has yet to be ground from the wheat (*Garbutt* v. *Watson*, 5 B. & Ald. 613), or the sale of wood or timber which requires to be cut and corded (*Smith* v. *N. Y. Central R. R.*, *supra*), nor where the defendants might procure other parties to manufacture the paper. (3 Pars. on Contracts, 52.) It was a simple naked agreement to manufacture at their own mills, and deliver at a specified price, 20,000 pounds of paper of specified sizes, no part of which was in existence at the time of making the contract. Indeed, there is no evidence that the rags and other materials from which it was to be manufactured were owned by the defendants, or were in existence, except so far as it may be argued that matter is indestructible, and that in some form they must necessarily have then existed. As to cases of this character, the course of decisions in this state has been uniform. If we desired to do otherwise, we have no choice; we must follow them.

The judgment must be affirmed with costs.

All concur for affirmance, except GRAY, C., dissenting.

Judgment affirmed with costs.

(*Dissenting opinion omitted.*)

GODDARD v. BINNEY.

115 Massachusetts, 450.—1874.)

IN APRIL, 1872, plaintiff agreed to build a buggy for defendant for $675. The buggy was completed September 15th, and on October 14th plaintiff sent defendant the following bill:

"BOSTON, October 14, 1872.

"Mr. H. P. Binney. Bo't of Thos. Goddard one new cane seat buggy, $675.

"Rec'd pay't.

"(Buggy was finished Sept. 15.)"

When the bill was presented, defendant said he would see

plaintiff soon, and promised to pay the bill. In November following, plaintiff's premises, with the buggy, were destroyed by fire, and he now seeks to recover the contract price.

AMES, J. Whether an agreement like that described in this report should be considered as a contract for the sale of goods, within the meaning of the statute of frauds, or a contract for labor, services and materials, and therefore not within that statute, is a question upon which there is a conflict of authority. According to a long course of decisions in New York, and in some other states of the Union, an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered, (such as flour from wheat not yet ground, or nails to be made from iron in the vendor's hands), is not a contract of sale within the meaning of the statute. *Crookshank* v. *Burrell*, 18 Johns. 58; *Sewall* v. *Fitch*, 8 Cow. 215; *Robertson* v. *Vaughn*, 5 Sandf. 1; *Downs* v. *Ross*, 23 Wend. 270; *Eichelberger* v. *M'Cauley*, 5 Har. & J. 213. In England, on the other hand, the tendency of the recent decisions is to treat all contracts of such a kind intended to result in a sale, as substantially contracts for the sale of chattels; and the decision in *Lee* v. *Griffin*, 1 B. & S. 272, goes so far as to hold that a contract to make and fit a set of artificial teeth for a patient is essentially a contract for the sale of goods, and therefore is subject to the provisions of the statute. See *Maberley* v. *Sheppard*, 10 Bing. 99; *Howe* v. *Palmer*, 3 B. & Ald. 321; *Baldey* v. *Parker*, 2 B. & C. 37; *Atkinson* v. *Bell*, 8 B. & C. 277.

In this commonwealth, a rule avoiding both of these extremes was established in *Mixer* v. *Howarth*, 21 Pick. 205, and has been recognized and affirmed in repeated decisions of more recent date. The effect of these decisions we understand to be this, namely, that a contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute. *Spencer* v. *Cone*, 1 Met. 283. "The distinction," says Chief Justice Shaw, in *Lamb* v. *Crafts*, 12 Met.

353, "we believe is now well understood. When a person stipulates for the future sale of articles, which he is habitually making, and which, at the time, are not made or finished, it is essentially a contract of sale, and not a contract for labor; otherwise, when the article is made pursuant to the agreement." In *Gardner* v. *Joy*, 9 Met. 177, a contract to buy a certain number of boxes of candles at a fixed rate per pound, which the vendor said he would manufacture and deliver in about three months, was held to be a contract of sale and within the statute. To the same general effect are *Waterman* v. *Meigs*, 4 Cush. 497, and *Clark* v. *Nichols*, 107 Mass. 547. It is true that in "the infinitely various shades of different contracts," there is some practical difficulty in disposing of the questions that arise under that section of the statute. Gen. Stats. c. 105, § 5. But we see no ground for holding that there is any uncertainty in the rule itself. On the contrary, its correctness and justice are clearly implied or expressly affirmed in all of our decisions upon the subject-matter. It is proper to say also that the present case is a much stronger one than *Mixer* v. *Howarth*. In this case, the carriage was not only built for the defendant, but in conformity in some respects with his directions, and at his request was marked with his initials. It was neither intended nor adapted for the general market. As we are by no means prepared to overrule the decision in that case, we must therefore hold that the statute of frauds does not apply to the contract which the plaintiff is seeking to enforce in this action.

Independently of that statute, and in cases to which it does not apply, it is well settled that as between the immediate parties, property in personal chattels may pass by bargain and sale without actual delivery. If the parties have agreed upon the specific thing that is sold and the price that the buyer is to pay for it, and nothing remains to be done but that the buyer should pay the price and take the same thing, the property passes to the buyer, and with it the risk of loss by fire or any other accident. The appropriation of the chattel to the buyer is equivalent, for that purpose, to delivery by the seller. The assent of the buyer to take the specific chattel is equivalent for the same purpose to his acceptance of possession: *Dixon* v. *Yates*, 5 B. & Ad. 313, 340. The property may well be in the buyer, though the right of possession, or lien for the price, is in the seller. There could in fact be no such lien without a

change of ownership. No man can be said to have a lien, in the proper sense of the term, upon his own property, and the seller's lien can only be upon the buyer's property. It has often been decided that assumpsit for the price of goods bargained and sold can be maintained where the goods have been selected by the buyer, and set apart for him by the seller, though not actually delivered to him, and where nothing remains to be done except that the buyer should pay the agreed price. In such a state of things the property vests in him, and with it the risk of any accident that may happen to the goods in the meantime. Noy's Maxims, 89; 2 Kent, Com. (12th ed.) 492; *Bloxam* v. *Sanders*, 4 B. & C. 941; *Tarling* v. *Baxter*, 6 B. & C. 360; *Hinde* v. *Whitehouse*, 7 East, 571; *Macomber* v. *Parker*, 13 Pick. 175, 183; *Morse* v. *Sherman*, 106 Mass. 430.

In the present case, nothing remained to be done on the part of the plaintiff. The price had been agreed upon; the specific chattel had been finished according to order, set apart and appropriated for the defendant, and marked with his initials.

The plaintiff had not undertaken to deliver it elsewhere than on his own premises. He gave notice that it was finished, and presented his bill to the defendant, who promised to pay it soon. He had previously requested that the carriage should not be sold, a request which substantially is equivalent to asking the plaintiff to keep it for him when finished. Without contending that these circumstances amount to a delivery and acceptance within the statute of frauds, the plaintiff may well claim that enough has been done, in a case not within that statute, to vest the general ownership in the defendant, and to cast upon him the risk of loss by fire, while the chattel remained in the plaintiff's possession.

According to the terms of the reservation, the verdict must be set aside, and

Judgment entered for the plaintiff.

Cooke v. Millard.

(65 New York, 352.—1875.)

Dwight, C. . . . The question is thus reduced to the following proposition: Is a contract which is, in form, one of sale of lumber then in existence for a fixed price, where the seller agrees to put it into a state of fitness to fill the order of the purchaser, his work being included in the price, in fact a contract for work and labor and not one of sale, and, accordingly, not within the statute of frauds?

The New York statute is made applicable to the "sale of any goods, chattels, or things in action," for the price of $50.00 or more. The words "goods and chattels" are, literally taken, probably more comprehensive than the expressions in the English statute, "goods, wares and merchandise." It will be assumed, however, in this discussion, that they are equivalent.

There are, at least, three distinct views as to the meaning of the words in the statute. These may be called, for the sake of convenience, the English, the Massachusetts and the New York rules, as representing the decisions in the respective courts.

The English rule lays special stress upon the point, whether the articles bargained for, can be regarded as goods capable of sale by the professed seller at the time of delivery, without any reference to the inquiry whether they were in existence at the time of the contract or not. If a manufacturer is to produce an article which at the time of the delivery could be the subject of sale by him, the case is within the statute of frauds. The rule excludes all cases where work is done upon the goods of another, or even materials supplied or added to the goods of another. Thus, if a carriage-maker should repair my carriage, both furnishing labor and supplying materials, it would be a contract for work and labor, as the whole result of his efforts would not produce a chattel which could be the subject of sale *by him*. If, on the other haud, by the contract he lays out work or materials, or both, so as to produce a chattel which he could sell to me, the contract is within the statute. This conclusion has been reached only after great discussion and much fluctuation of opinion, but must now be regarded as settled.

The leading case upon this point is *Lee* v. *Griffin*, 1 Best & Smith, 272. . .

The Massachusetts rule, as applicable to goods manufactured or modified after the bargain for them is made, mainly regards the point whether the products can, *at the time stipulated for delivery*, be regarded as "*goods*, *wares* and *merchandise*," in the sense of being generally marketable commodities, made by the manufacturer. In that respect, it agrees with the English rule. The test is not the non-existence of the commodity at the time of the bargain. It is, rather, whether the manufacturer produces the article in the general course of his business or as the result of a special order. (*Goddard* v. *Binney*, 115 Mass. 450.) . . .

The New York rule is still different. It is held here by a long course of decisions, that an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered, such as flour from wheat not yet ground, or nails to be made from iron belonging to the manufacturer, is not a contract of sale. The New York rule lays stress on the word *sale*. There must be a sale at the time the contract is made. The latest and most authoritative expression of the rule is found in a recent case in this court. (*Parsons* v. *Loucks*, 48 N. Y. 17, 19.) The contract between *Parsons* v. *Loucks*, in this state, on the one hand, and *Lee* v. *Griffin*, *supra*, in England, on the other is, that in the former case, the word *sale* refers to the time of entering into the contract, while in the latter, reference is had to the time of delivery, as contemplated by the parties. If at that time it is a chattel it is enough, according to the English rule. Other cases in this state agreeing with *Parsons* v. *Loucks*, are *Crookshank* v. *Burrell*, 18 J. R. 58; *Sewall* v. *Fitch*, 8 Cow. 215; *Robertson* v. *Vaughn*, 5 Sandf. S. C. 1; *Parker* v. *Schenck*, 28 Barb. 38. These cases are based on certain old decisions in England, such as *Towers* v. *Osborne*, 1 Strange, 506, and *Clayton* v. *Andrews*, 4 Burrow, 2101, which have been wholly discarded in that country.

The case at bar does not fall within the rule in *Parsons* v. *Loucks*. The facts of that case were, that a manufacturer agreed to make for the other party to the contract two tons of book paper. The paper was not in existence, and, so far as appears, not even the rags, "except so far as such existence may be

argued from the fact that matter is indestructible." So in *Sewall* v. *Fitch*, *supra*, the nails which were the subject of the contract were not then wrought out, but were to be made and delivered at a future day.

Nothing of this kind is found in the present case. The lumber, with the possible exception of the clapboards, was all in existence when the contract was made. It only needed to be prepared for the purchaser—dressed and put in a condition to fill his order. The court, accordingly, is not hampered in the disposition of this cause by authority, but may proceed upon principle.

Were this subject now open to full discussion upon principle, no more convenient and easily understood rule could be adopted than that enunciated in *Lee* v. *Griffin*. It is at once so philosophical, and so readily comprehensible, that it is a matter of surprise that it should have been first announced at so late a stage in the discussion of the statute. It is too late to adopt it in full in this state. So far as authoritative decisions have gone, they must be respected, even at the expense of sound principle. The court, however, in view of the present state of the law, should plant itself, so far as it is not precluded from doing so by authority, upon some clearly intelligible ground, and introduce no more nice and perplexing distinctions. I think that the true rule to be applied in this state is, that when the chattel is in existence, so as not to be governed by *Parsons* v. *Loucks*, *supra*, the contract should be deemed to be one of sale, even though it may have been ordered from a seller who is to do some work upon it to adapt it to the uses of the purchaser. Such a rule makes but a single distinction, and that is between existing and non-existing chattels. There will still be border cases where it will be difficult to draw the line, and to discover whether the chattels are in existence or not. The mass of the cases will, however, readily be classified. If, on further discussion, the rule in *Lee* v. *Griffin* should be found most desirable as applicable to both kinds of transactions, a proper case will be presented for the consideration of the legislature.

The view that this case is one of sale is sustained by *Smith* v. *The Central Railroad Company*, 4 Keyes, 180, and by *Downs & Skillinger* v. *Ross*, 23 Wend. 270.

In the first of these cases, there was a contract for the sale and delivery of a quantity of wood, to be cut from trees stand-

ing on the plaintiff's land. The court held that it could not be treated as an agreement for work and labor in manufacturing fire-wood out of standing trees. The cases already cited were distinguished in the fact that no change in the thing sold and to be delivered was contemplated, and that the transaction could be regarded as a sale in perfect consistency with the cases which hold that where the substance of the contract consists in the act of converting materials into a new and wholly different article, it is an agreement for work and labor. It was further considered that the case of *Towers* v. *Osborne*, 1 Strange, 506, where an agreement for the manufacture of a chariot was a contract for work and labor, was extreme in its nature, and was not to be carried any further. (p. 200.) The cases of *Garbutt* v. *Watson*, 5 B. & A. 613 and *Smith* v. *Surman*, 9 B. & C. 561, were cited with approval. In *Garbutt* v. *Watson*, a sale of flour by a miller was held within the statute, although not ground when the bargain was made.

In *Downs, etc.*, v. *Ross*, there was a contract for the sale of 750 bushels of wheat, 250 of the quantity being in a granary, and the residue unthreshed, but which the vender agreed to get ready and deliver. The court held the contract to be within the statute of frauds, notwithstanding that the act of threshing was to be done by the vender. The rule that governed the court was, that if the thing sold exist at the time *in solido*, the mere fact that something remains to be done to put it in a marketable condition will not take the contract out of the operation of the statute. (p. 272.) This proposition is in marked contrast to the view expressed by Cowen, J., in a dissenting opinion. His theory was, that where the article which forms the subject of sale is understood by the parties to be defective in any particular which demands the finishing labor of the vender in order to satisfy the bargain, it is a contract for work and labor, and not of sale. The two theories (where the goods exist at the time of sale), have nowhere been more tersely and distinctly stated than in the conflicting opinions of Bronson and Cowen, JJ., in this case. (See, also, *Courtright* v. *Stewart*, 19 Barb. 455.)

The fallacy in the proposition of Cowen, J., is in assuming that there is any "*work and labor*" done for the vendee. All the work and labor is done on the vendor's property to put it in a condition to enable him to sell it. His compensation for it

is found in the price of the goods sold. It is a juggle of words to call this "a mixed contract of sale and work and labor." When the goods leave the vendor's hands and pass over to the vendee, they pass as chattels under an executed contract of sale. While anything remained to be done the contract was executory. There is abundance of authority for maintaining that a contract executory in its origin may, by the performance of acts under its terms, by one of the parties, become, in the end, executed. (*Rohde* v. *Thwaites*, 3 B. & C. 388; Benjamin on Sales, chap. 5, and cases cited.)

The cases of *Donovan* v. *Wilson*, 26 Barb. 138, and *Parker* v. *Schenck*, 28 id. 38, are to be upheld as falling within the principle of *Parsons* v. *Loucks*, *supra*. Both of these cases concerned articles not in existence, but to be produced by the manufacturer; in the one case beer was to be manufactured, and in the other a brass pump. So in *Passaic Manufacturing Company*, 3 Daly, 495, the contract was for the manufacture and delivery of fifty warps. None of these were in existence when the order was received. While the case appears to fall within the rule of *Parsons* v. *Loucks*, the eminent judge who wrote an elaborate opinion expressing the views of the court would seem to rely upon the Massachusetts rule rather than our own. Whatever view might be entertained of the soundness of that distinction it is now too late to adopt it here, and the case cannot be sustained on that ground.

The only case in our reports appearing to stand in the way of the conclusion arrived at in this cause is *Mead* v. *Case*, 33 Barb. 202. The court in that case recognized the distinction herein upheld. The only doubt about the case is, whether the court correctly applied the rule to the facts. These were that several pieces of marble put together in the form of a monument were standing in the yard of a marble cutter. That person agreed with the buyer to polish, letter and finish the article as a monument, and to dispose of it for an entire price—$200. The court held that there was no *monument in existence* at the time of the bargain. There were pieces of stone in the similitude of a monument, and that was all.

It is unnecessary to quarrel with this case. If unsound, it is only a case of a misapplication of an established rule. If sound, it is a so-called "border case," showing the refinements which are likely to arise in applying to various transactions the rule

adopted in *Sewall* v. *Fitch*, and kindred cases. It is proper, however, to say that the notion that such an arrangement of marble placed in a cemetery over a grave cannot be regarded as a monument, in the absence of an inscription, seems highly strained. Then there could not be a memorial church without an inscription. Then it could not have been said of Sir Christopher Wren, in his relation to one of his great architectural productions, "*Si quæris monumentum, circumspice.*" It would seem to be enough if the monument reminds the passer-by of him whom it is intended to commemorate, and this might be by tradition, inscriptions on adjoining or neighboring objects, or otherwise.

In the view of these principles, the defendants had the right to set up the statute of frauds. I think that this was so even as to the clapboards. Although not strictly in existence as clapboards, they fall within the rule in *Smith* v. *Central Railroad Company*. They were no more new products than was the wood in that case. There was simply to be gone through with a process of dividing and adapting existing materials to the plaintiffs' use. It would be difficult to distinguish between splitting planks into clapboards, and trees into wood. No especial skill is required, as all the work is done by machinery in general use, and readily managed by any producers of ordinary intelligence. The case bears no resemblance to that of *Parsons* v. *Loucks*, where the product was to be created from materials in no respect existing in the form of paper. The cases would have been more analogous had the contract in that case been to divide large sheets of paper into small ones, or to make packages of envelopes from existing paper. In *Gilman* v. *Hall*, 36 N. H. 311, it was held that the contract for sheep pelts to be taken from sheep was a contract for things in existence and a sale.

* * * * * * * *

Green v. Armstrong.

(1 Denio, 550.—1845.)

By the Court. Beardsley, J. A verbal contract was made between these parties, by which the defendant agreed to sell certain trees then standing and growing on his land, to the plaintiff, with liberty to cut and remove the same at any time within twenty years from the making of the contract. A part of the trees were cut and removed under this agreement, but the defendant then refused to permit any more to be taken, and for this the plaintiff brought his action in the justice's court, where a judgment was rendered in his favor. On the trial of the cause the defendant objected to proof of such parol contract, but the objection was overruled. The judgment was removed by *certiorari* to the court of common pleas of Oneida county, and was reversed by that court, on the ground, as the record states, that the contract, not being in writing, was void by the statute of frauds.

As the declaration stated that the contract was by parol, and not in writing, and the defendant pleaded instead of demurring, it is now urged on behalf of the plaintiff in error, that the defendant was precluded from objecting, on the trial of the cause before the justice, or in the court of common pleas, to proof of a parol contract, or that such contract was void. It is insisted the defendant should have demurred, if a verbal contract like this was invalid, and that by pleading to the declaration, its sufficiency, and consequently the validity of the contract as stated, were admitted; and if, in truth, the contract was for this reason void, the defendant, having failed to make the objection at the proper time and in an appropriate manner, is now remediless.

If the action had been pending in this court, or in a court of common pleas, the principles stated would, to a certain extent, have been applicable; for the objection that the contract was by parol and not in writing, could not have been made on the trial of the issue joined. But a verdict on the issue would not have concluded the defendant, for he might still move in arrest of judgment, and thus raise the question as to the validity of the contract declared on. A motion in arrest, however, cannot be

made in the justice's court, and where issue has been joined, as in this case, if the defendant cannot, on the trial or on *certiorari*, object that the contract is void, he is without any redress whatever. But pleading to a declaration, when the party might have demurred, cannot be allowed to have any such conclusive effect upon the rights of the party: it cannot make a void contract valid, or at all change the real rights of the litigant parties. The orderly and formal mode of making the objection would be by demurrer or motion in arrest; but this is only a matter of form. And as it was too late to demur, and a motion in arrest could not be made, I have no difficulty in saying the objection was properly made on the trial, and in the common pleas, and it must now be determined by this court.

The revised statutes declare that no "interest in lands" shall be created, unless by deed or conveyance in writing; and that every contract for the sale of "any interest in lands" shall be void unless in writing. (2 R. S. 134, §§ 6, 8.) Certain exceptions and qualifications to these enactments are contained in the sections referred to, but none which touch the question now before the court: and so far as respects this question the former statute of New York, and the English statute of 29 Char. 2, ch. 3, contain similar provisions. (1 R. L. of 1813, p. 78; Chit. on Cont. 299.)

The precise question in this case is, whether an agreement for the sale of growing trees, with a right to enter on the land at a future time and remove them, is a contract for the sale of an interest in land. If it is, it must follow that the one declared on in this case, not being in writing, was invalid, and the judgment of the common pleas reversing that of the justice, was correct and must be affirmed.

And in the outset I must observe, that this question has not, to my knowledge, been decided in this state. It has, however, arisen in the English courts, and in some of those of our sister states; but their decisions are contradictory, and the views of individual judges wholly irreconcilable with each other. (Greenleaf's Ev. 2d ed. § 271, and notes; Chit. on Cont. 299 to 302, 4 Kent's Com. 5th ed. 450–1.) We are, therefore, as it seems to me, at full liberty to adopt a broad principle, if one can be found, which will determine this precise question in a manner which our judgments shall approve, and especially if it be equally applicable to other and analogous cases.

By the statute, a contract for the sale of "any interest in lands" is void unless in writing. The word *land* is comprehensive in its import, and includes many things besides the earth we tread on, as waters, grass, stones, buildings, fences, trees and the like; for all these may be conveyed by the general designation of land. (1 Shep. Touch. by Preston, 91; 1 Inst. 4; 1 Preston on Estates, 8; 2 Black. Com. 17, 18; 1 R. S. 387, § 2; 2 id. 137, § 6.) Standing trees are therefore part and parcel of the land in which they are rooted, and as such are real property. They pass to the heir by descent as part of the inheritance, and not, as personal chattels do, to the executor or administrator. (Toller's Law of Executors, 193–5; 2 Black. Com. by Chitty, 122 note; Rob. on Frauds, 365–6; *Richard Liford's Case*, 11 Rep. 46; Com. Dig. Biens, [H.].) And being strictly real property, they cannot be sold on an execution against chattels only. (*Scorell* v. *Boxall*, 1 Younge & Jer. 396; *Evans* v. *Roberts*, 5 Barn. & Cress. 829.)

It is otherwise with growing crops, as wheat and corn, the annual produce of labor and cultivation of the earth; for these are personal chattels, and pass to those entitled to the personal estate, and not to the heir. (Toller, 150, 194; 2 Black. Com. 404.) They may also be sold on execution like other personal chattels. (*Whipple* v. *Foot*, 2 John. 418; *Jones* v. *Flint*, 10 Adol. & Ellis, 753; *Peacock* v. *Purvis*, 2 Brod. & Bing. 362; *Hartwell* v. *Bissell*, 17 John. 128.)

These principles suggest the proper distinction. An interest in personal chattels may be created without a deed or conveyance in writing, and a contract for their sale may be valid although by parol. But an interest in that which is land, can only be created by deed or written conveyance: and no contract for the sale of such an interest is valid unless in writing. It is not material and does not affect the principle, that the subject of the sale will be personal property when transferred to the purchaser. If, when sold, it is, in the hands of the seller, a part of the land itself, the contract is within the statute. These trees were part of the defendant's land and not his personal chattels. The contract for their sale and transfer, being by parol, was therefore void.

The opinion of the court in the case of *Dunne* v. *Ferguson*, 1 Hayes (Irish), R. 542, contains one of the best illustrations of this question. That case is thus stated in Stephens' N. P.

(1971). "The facts of the case were, that in October, 1830, the defendants sold to the plaintiff a crop of turnips, which he had sown a short time previously, for a sum less than £10. In February, 1831, and previously, while the turnips were still in the ground, the defendants severed and carried away considerable quantities of them, which he converted to his own use. No note in writing was made of the bargain. It was contended for the defendant, that the action of trover did not lie for things annexed to the freehold, and that the contract was of no validity for want of a note or memorandum in writing pursuant to the statute of frauds. Upon the foregoing facts Chief Baron Joy observed, (Barons Smith, Pennefeather and Foster, concurring), "The general question for our decision is, whether there has been a contract for an interest concerning lands, within the second section of the statute of frauds? or whether it merely concerned goods and chattels? And that question resolves itself into another, whether or not a growing crop is goods and chattels? In one case it has been held, that a contract for potatoes did not require a note in writing, because the potatoes were ripe: and in another case, the distinction turned upon the hand that was to dig them, so that if dug by A. B. they were potatoes, and if by C. D. they were an interest in lands. Such a course always involves the judge in perplexity, and the case in obscurity. Another criterion must, therefore, be had recourse to; and, fortunately, the later cases have rested the matter on a more rational and solid foundation. At common law, growing crops were uniformly held to be goods; and they were subject to all the leading consequences of being goods, as seizure in execution, &c. The statute of frauds takes things as it finds them, and provides for lands and goods according as they were so esteemed before its enactment. In this way the question may be satisfactorily decided. If, before the statute, a growing crop has been held to be an interest in lands, it would come within the second section of the act, but if it were only goods and chattels, then it came within the thirteenth section. On this, the only rational ground, the cases of *Evans* v. *Roberts*, 5 Barn. & Cress. 829; *Smith* v. *Surman*, 9 id. 561; and *Scorell* v. *Boxall*, 1 Younge & Jer. 396, have been decided. And as we think that growing crops have all the consequences of chattels, and are like them, liable to be taken in execution, we must rule the points saved for the plaintiff."

Various other decisions have proceeded on the same principle, although it has nowhere been stated and illustrated with the same clearness and force as in the opinion of Chief Baron Joy.

The following cases may be cited to show that growing crops of grains and vegetables, *fructus industriales*, being goods and chattels, and not real estate, may be conveyed by a verbal contract, as they may also be sold on execution as personal chattels. (*Carrington* v. *Roots*, 2 Mees. & Wels. 248; *Sainsbury* v. *Matthews*, 4 id. 343; *Randall* v. *Ramer*, 2 John. 421, note; *Mumford* v. *Whitney*, 15 Wend. 387; *Austin* v. *Sawyer*, 9 Cowen, 39; *Jones* v. *Flint*, 10 Adol. & Ellis, 753; *Warwick* v. *Bruce*, 2 Maule & Selw. 205; *Graves* v. *Weld*, 5 Barn. & Adol. 105.)

But where the subject-matter of a contract of sale, is growing trees, fruit or grass, the natural produce of the earth, and not annual productions raised by manurance and the industry of man, as they are parcel of the land itself, and not chattels, the contract, in order to be valid, must be in writing. (*Teal* v. *Auty*, 2 Brod. & Bing. 99; *Putney* v. *Day*, 6 N. Hamp. R. 430; *Olmstead* v. *Niles*, 7 id. 522; *Crosby* v. *Wadsworth*, 6 East, 602; *Rodwell* v. *Phillips*, 9 Mees. & Wels. 501; *Jones* v. *Flint*, 10 Adol. & Ellis, 753.)

The contract in this case was within the statute, and being by parol was void. The judgment of the common pleas must be affirmed.

Judgment affirmed.[1]

KILLMORE v. HOWLETT.

(48 New York, 569.—1872.)

ACTION to recover damages for breach of contract.

The defendant, owner of a certain tract of land, orally agreed with the plaintiff to cut the trees, then growing on said tract, into cord-wood, and to deliver the same at plaintiff's wood yard; and the plaintiff agreed to pay the defendant $5.00 per cord

[1] See article on Sales of Standing Trees by Edmund H. Bennett in Harvard Law Review, VIII., 367.

therefor. The defendant cut and delivered sixty cords, and the plaintiff paid the agreed price. The price of wood subsequently advanced, and the defendant refused to deliver any more at the price agreed upon.

Judgment for plaintiff.

GRAY, C. If the standing trees upon the lot, which by the contract were to have been cut by the defendant and made into cord-wood, and delivered by him to the plaintiff at Syracuse, had, instead of the wood to be made therefrom, been sold in their standing condition, "rooted in the soil," the right of the plaintiff to enter and fell them, and make them into wood, would have been a sale of an interest in the land, and without being evidenced by writing would have been void. (*Green* v. *Armstrong*, 1 Denio, 550, 553, *et seq.*) This was not a sale of the trees in their standing condition, but rather a contract by the defendant to bestow work and labor upon his own material, and deliver it in its improved condition to the plaintiff. In a similar case, Littledale, J., in *Smith* v. *Surnam*, 9 B. & C. 561, 566, held it not to be the intention to give the vendee any property in the trees until they were severed from the freehold. Apply the rule contended for by the defendant [*that the agreement was for the sale of an interest in land and being by parol was void*], and a writing would be indispensable to the validity of a contract by the owner of a peat bed or a sandbank to deliver a load from it. Such contracts are never regarded as carrying an interest in the real estate from which the thing sold was to be taken by the owner. The judgment should be affirmed.

All concur.

Judgment affirmed.

TISDALE v. HARRIS.

(20 Pickering, 9.—1838.)

ASSUMPSIT by the plaintiff of New York against the defendant of Boston, on a contract alleged to have been made in October, 1835, by which the defendant agreed to sell to the plaintiff 200 shares, with all the earnings thereon, of the capital stock of the Collins Manufacturing Company, a corporation established in Connecticut, at $10.80, the par value being $10.00 per share. The object of the suit was to recover $300, being the amount of a dividend of 15 per cent on the 200 shares, declared on the 7th of October, 1835, and payable on the 15th.

SHAW, C. J., delivered the opinion of the court.

Several points reserved at the trial of this cause, are now waived, and the motion made by the defendant for a new trial, is placed on two grounds.

First, that under the circumstances, parol evidence was not admissible, because the contract of the parties was reduced to writing, and that such writing was the best evidence. But the Court are of opinion, that the objection is not sustained by the fact. No contract in writing was made by the defendant with the plaintiff, to sell those shares. After the negotiation had resulted in an agreement, the agent of the plaintiff, in the name of his firm, gave the defendant a memorandum in writing, undertaking to pay the money, on the performance of the defendant's agreement to transfer the shares. But it was not signed by the defendant, nor by any person for him, nor did it purport to express his agreement. The Court are therefore of opinion, that the defendant's agreement not being reduced to writing, the parol evidence was rightly admitted.

But by far the most important question in the case, arises on the objection, that the case is within the statute of frauds. This statute, which is copied precisely from the English statute, is as follows: "No contract for the sale of goods, wares or merchandise, for the price of ten pounds ($33.33) or more, shall be allowed to be good, except the purchaser shall accept part of the goods so sold, and actually receive the same or give something in earnest to bind the bargain, or in part payment, or that

some note or memorandum in writing of the said bargain, be made and signed by the parties to be charged by such contract, or their agent, thereunto lawfully authorized."

This being a contract for the sale of shares in an incorporated company in a neighboring State, for the price of more than £10, and no part having been delivered, and no purchase-money or earnest paid, the question is, whether it can be allowed to be good, without a note or memorandum in writing, signed by the party to be charged with it. This depends upon the question, whether such shares are goods, wares or merchandise within the true meaning of the statute.

It is somewhat remarkable that this question, arising on the St. 29, Car. 2, in the same terms, which ours has copied, has not been definitively settled in England. In the case of *Pickering* v. *Appleby*, Com. Rep. 354, the case was directly and fully argued, before the twelve judges, who were equally divided upon it. But in several other cases afterwards determined in Chancery, the better opinion seemed to be, that shares in incorporated companies, were within the statute, as goods or merchandise. *Mussell* v. *Cooke*, Finch, Prec. in Ch. 533; *Crull* v. *Dodson*, Sel. Cas. in Ch. 41.

We are inclined to the opinion, that the weight of authorities, in modern times, is, that contracts for the sale of stocks and shares in incorporated companies, for more than £10, are not valid, unless there has been a note or memorandum in writing, or earnest or part payment. 4 Wheaton 89, note; 3 Starkie on Evid. 4th Amer. ed. 608.

Supposing this a new question now for the first time calling for a construction of the statute, the Court are of opinion, that as well by its terms, as its general policy, stocks are fairly within its operation. The words "goods" and "merchandise," are both of very large signification. *Bona*, as used in the civil law, is almost as extensive as personal property itself, and in many respects it has nearly as large a signification in the common law. The word "merchandise" also, including, in general, objects of traffic and commerce, is broad enough to include stocks or shares in incorporated companies.

There are many cases indeed in which it has been held in England, that buying and selling stocks did not subject a person to the operation of the bankrupt laws, and thence it has been argued that they cannot be considered as merchandise,

because bankruptcy extends to persons using the trade of merchandise. But it must be recollected that the bankrupt acts were deemed to be highly penal, and coercive, and tended to deprive a man in trade of all his property. But most joint stock companies were founded on the hypothesis at least, that most of the shareholders took shares as an investment and not as an object of traffic; and the construction in question only decided, that by taking and holding such shares merely as an investment, a man should not be deemed a merchant so as to subject himself to the highly coercive process of the bankrupt laws. These cases, therefore, do not bear much on the general question.

The main argument relied upon, by those who contend that shares are not within the statute, is this: That statute provides that such contract shall not be good, etc., among other things, except the purchaser shall accept part of the goods. From this it is argued, that by necessary implication, the statute applies only to goods, of which part may be delivered. This seems however to be rather a narrow and forced construction. The provision is general, that no contract for the sale of goods, etc., shall be allowed to be good. The exception is, when part are delivered; but if part cannot be delivered, then the exception cannot exist to take the case out of the general prohibition. The provision extended to a great variety of objects, and the exception may well be construed to apply only to such of those objects to which it is applicable, without affecting others, to which from their nature it cannot apply.

There is nothing in the nature of stocks, or shares in companies, which in reason or sound policy should exempt contracts in respect to them from those reasonable restrictions, designed by the statute to prevent frauds in the sale of other commodities. On the contrary, these companies have become so numerous, so large an amount of the property of the community is now invested in them, and as the ordinary *indicia* of property, arising from delivery and possession, cannot take place, there seems to be peculiar reason for extending the provisions of this statute to them. As they may properly be included under the term goods, as they are within the reason and policy of the act, the court are of opinion, that a contract for the sale of shares, in the absence of the other requisites, must be proved by some note or memorandum in writing; and as there was no such memorandum in writing, in the present case, the plaintiff is not

entitled to maintain this action. As to the argument, that here was a part performance, by a payment of the money on one side, and the delivery of the certificate on the other, these acts took place after this action was brought, and cannot therefore be relied upon to show a cause of action when the action was commenced.

Verdict set aside, and plaintiff nonsuit.

BALDWIN v. WILLIAMS.

(3 Metcalf, 365.—1841.)

THIS was an action of assumpsit, and the declaration set forth an agreement of the plaintiff, that he would bargain, sell, assign, transfer and set over to the defendant, and indorse without recourse to him, the plaintiff, in any event, two notes of hand by him held, signed by S. J. Gardner; one dated April 24, 1835, for the payment of $1,500; the other dated May 5, 1836, for the payment of $500; and both payable to the plaintiff, or order, on the 3d of April, 1839, with interest from their dates. The declaration set forth an agreement by the defendant, in consideration of the plaintiff's agreement aforesaid, and in payment for said Gardner's said notes, to pay the plaintiff $1,000 in cash, and to give the plaintiff a post note for $1,000 made by the Lafayette Bank, and also a note signed by J. B. Russell & Co. and indorsed by D. W. Williams, for $1,000.

The plaintiff, at the trial, proved an oral agreement with the defendant, as set forth in the declaration, and an offer by the plaintiff to comply with his part of said agreement, and a tender of said Gardner's said notes, indorsed by the plaintiff, without recourse to him in any event, and a demand upon the defendant to fulfill his part of said agreement, and the refusal of the defendant to do so. But the plaintiff introduced no evidence tending to show that anything passed between the parties at the time of making the said agreement, or was given in earnest to bind the bargain.

The judge advised a nonsuit upon this evidence, because the contract was not in writing or proved by any note or memo-

randum in writing signed by the defendant or his agent, and nothing was received by the purchaser, or given in earnest to bind the bargain. A nonsuit was accordingly entered, which is to stand, if in the opinion of the whole court the agreement, set forth in the declaration, falls within the statute of frauds—Rev. Stats. c. 74, § 4. Otherwise, the nonsuit to be taken off, and a new trial granted.

WILDE, J. This action is founded on an oral contract, and the question is, whether it is a contract of sale within the statute of frauds.

The plaintiff's counsel contends, in the first place, that the contract is not a contract for the sale of the notes mentioned in the declaration, but a mere agreement for the exchange of them; and, in the second place, that if the agreement is to be considered as a contract of sale, yet it is not a contract within that statute.

As to the first point, the defendant's counsel contends, that an agreement to exchange notes is a mutual contract of sale. But it is not necessary to decide this question, for the agreement of the defendant as alleged in the declaration, was, to pay for the plaintiff's two notes $2,000 in cash, in addition to two other notes; and that this was a contract of sale is, we think, very clear.

The other question is more doubtful. But the better opinion seems to us to be, that this is a contract within the true meaning of the statute of frauds. It is certainly within the mischief thereby intended to be prevented; and the words of the statute, "goods" and "merchandize," are sufficiently comprehensive to include promissory notes of hand. The word "goods" is a word of large signification; and so is the word "merchandize." "*Merx est quicquid vendi potest.*"

In *Tisdale* v. *Harris*, 20 Pick. 9, it was decided that a contract for the sale of shares in a manufacturing corporation is a contract for the sale of goods or merchandise within the statute; and the reasons on which that decision was founded seem fully to authorize a similar decision as to promissory notes of hand. A different decision has recently been made in England, in *Humble* v. *Mitchell*, 3 Perry & Davison, 141; *S. C.* 11 Adolph. & Ellis, 207. In that case it was decided that a contract for the sale of shares in a joint stock banking company was not

within the statute of frauds. But it seems to us that the reasoning, in the case of *Tisdale* v *Harris*, is very cogent and satisfactory; and it is supported by several other cases. In *Mills* v. *Gore*, 20 Pick. 28, it was decided that a bill in equity might be maintained to compel the redelivery of a deed and a promissory note of hand, on the provision in the Rev. Sts. c. 81, § 8, which gives the court jurisdiction in all suits to compel the redelivery of any *goods* or *chattels* whatsoever, taken and detained from the owner thereof, and secreted or withheld, so that the same cannot be replevied. And the same point was decided in *Clapp* v. *Shephard*, 23 Pick. 228. In a former statute (St. 1823, c. 140), there was a similar provision which extended expressly to "any goods or chattels, deed, bond, note, bill, specialty, writing, or other personal property." And the learned commissioners, in a note on the Rev. Sts. c. 81, § 8, say, that the words "'goods or chattels' are supposed to comprehend the several particulars immediately following them in St. 1823, c. 140, as well as many others that are not mentioned."

The word "chattels" is not contained in the provision of the statute of frauds; but personal chattels are movable goods, and, so far as these words may relate to the question under consideration, they seem to have the same meaning. But however this may be, we think the present case cannot be distinguished in principle from *Tisdale* v. *Harris;* and upon the authority of that case, taking into consideration again the reasons and principles on which it was decided, we are of opinion that the contract in question is within the statute of frauds, and consequently that the motion to set aside the nonsuit must be overruled.

BALDEY ET AL. v. PARKER.

(2 Barnewall & Cresswell, 37.—1823.)

ASSUMPSIT for goods sold and delivered. Plea, general issue. At the trial . . . the following appeared to be the facts of the case. The plaintiffs are linen-drapers, and the defendant came to their shop and bargained for various articles. A sep-

arate price was agreed upon for each, and no one article was of the value of £ 10. Some were measured in his presence, some he marked with a pencil, others he assisted in cutting from a larger bulk. He then desired an account of the whole to be sent to his house, and went away. A bill of parcels was accordingly made out and sent by a shopman. The amount of the goods were £ 70. . . . The goods were afterwards sent to the defendant's house, and he refused to accept them. The lord chief justice thought that this was a contract for goods of more than the value of £ 10 within the meaning of the 17th section of the Statute of Frauds, and not within any of the exceptions there mentioned, and directed a nonsuit; but gave the plaintiffs leave to move to enter a verdict in their favor for £ 70.

ABBOTT, C. J. We have given our opinion upon more than one occasion, that the 29 Car. 2, c. 3 is a highly beneficial and remedial statute. We are therefore bound so to construe it as to further the object and intention of the legislature, which was the prevention of fraud. It appeared from the facts of this case, that the defendant went into the plaintiffs' shop and bargained for various articles. Some were severed from a larger bulk, and some he marked in order to satisfy himself that the same were afterwards sent home to him. The first question is, whether this was one entire contract for the sale of all the goods. By holding that it was not, we should entirely defeat the object of the statute. For then persons intending to buy many articles at one time, amounting in the whole to a large price, might withdraw the case from the operation of the statute by making a separate bargain for each article. Looking at the whole transaction, I am of opinion that the parties must be considered to have made one entire contract for the whole of the articles. The plaintiffs cannot maintain this action unless they can show that the case is within the exception of the 29 Car. 2, c. 3, s. 17. Now the words of that exception are peculiar, "except the buyer shall accept part of the goods so sold, and actually receive the same." It would be difficult to find words more distinctly denoting an actual transfer of the article from the seller, and an actual taking possession of it by the buyer. If we held that such a transfer and acceptance were complete in this case, it would seem to follow as a necessary consequence that the vendee might maintain trover without paying for the goods, and

leave the vendor to this action for the price. Such a doctrine would be highly injurious to trade, and it is satisfactory to find that the law warrants us in saying that this transaction had no such effect.

Rule discharged.[1]

Butler v. Thomson et al.

(92 United States, 412.—1875.)

Mr. Justice Hunt delivered the opinion of the court.

The plaintiff alleged that on the eleventh day of July, 1867, he bargained and sold to the defendants a quantity of iron thereafter to arrive, at prices named, and that the defendants agreed to accept the same, and pay the purchase-money therefor; that the iron arrived in due time, and was tendered to the defendants, who refused to receive and pay for the same; and that the plaintiff afterwards sold the same at a loss of $6,581, which sum he requires the defendants to make good to him. The defendants interposed a general denial.

Upon the trial, the case came down to this: The plaintiff employed certain brokers of the city of New York to make sale for him of the expected iron. The brokers made sale of the same to the defendants at 12¾ cents per pound in gold, cash.

The following memorandum of sale was made by the brokers, viz:

"New York, July 10, 1867.

"Sold for Messrs. Butler & Co., Boston, to Messrs. A. A. Thomson & Co., New York, seven hundred and five (705) packs first-quality Russia sheet-iron, to arrive at New York, at twelve and three-quarters (12¾) cents per pound, gold, cash actual tare.

"Iron due about Sept. 1, '67.

"White & Hazzard, *Brokers.*"

The defendants contend, that, under the Statute of Frauds of the State of New York, this contract is not obligatory upon them. The judge before whom the cause was tried at the cir-

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[1] Concurring opinions by Holroyd, Bayley and Best, JJ., omitted.

cuit concurred in this view, and ordered judgment for the defendants. It is from this judgment that the present review is taken.

The provision of the statute of New York upon which the question arises (2 R. S. 136, sec. 3) is in these words:

"Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void, unless (1) a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby; or (2) unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or (3) unless the buyer shall at the time pay some part of the purchase-money."

The eighth section of the same title provides that "every instrument required by any of the provisions of this title to be subscribed by any party may be subscribed by the lawful agent of such party."

There is no pretense that any of the goods were accepted and received, or that any part of the purchase-money was paid. The question arises upon the first branch of the statute, that a memorandum of the contract shall be made in writing, and be subscribed by the parties to be charged thereby.

The defendants do not contend that there is not a sufficient subscription to the contract. White & Hazzard, who signed the instrument, are proved to have been the authorized agents of the plaintiff to sell, and of the defendants to buy; and their signature, it is conceded, is the signature both of the defendants and of the plaintiff.

The objection is to the sufficiency of the contract itself. The written memorandum recites that Butler & Co. had sold the iron to the defendants at a price named; but it is said there is no recital that the defendants had bought the iron. There is a contract of sale, it is argued, but not a contract of purchase.

As we understand the argument, it is an attack upon the contract, not only that it is not in compliance with the Statute of Frauds, but that it is void upon common-law principles. The evidence required by the statute to avoid frauds and perjuries —to wit, a written agreement—is present. Such as it is, the contract is sufficiently established, and possesses the evidence of its existence required by the Statute of Frauds.

The contention would be the same if the articles sold had not been of the price named in the statute; to wit, the sum of $50.00.

Let us examine the argument. Blackstone's definition of a sale is "a transmutation of property from one man to another in consideration of some price." 2 Bl. 446. Kent's is, "a contract for the transfer of property from one person to another." 2 Kent, 615. Bigelow, C. J., defines it in these words: "Competent parties to enter into a contract, an agreement to sell, the mutual assent of the parties to the subject-matter of the sale, and the price to be paid therefor." *Gardner* v. *Lane*, 12 Allen, 39, 43. A learned author says, "If any one of the ingredients be wanting, there is no sale." Atkinson on Sales, 5. Benjamin on Sales, p. 1, note, and p. 2, says, "To constitute a valid sale, there must be (1) parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; (4) a price in money, paid or promised."

How, then, can there be a sale of seven hundred and five packs of iron, unless there be a purchase of it? How can there be a seller, unless there be likewise a purchaser? These authorities require the existence of both. The essential idea of a sale is that of an agreement or meeting of minds by which a title passes from one, and vests in another. A man cannot sell his chattel by a perfected sale, and still remain its owner. There may be an offer to sell, subject to acceptance, which would bind the party offering, and not the other party until acceptance. The same may be said of an optional purchase upon a sufficient consideration. There is also a class of cases under the Statute of Frauds where it is held that the party who has signed the contract may be held chargeable upon it, and the other party, who has not furnished that evidence against himself, will not be thus chargeable. Unilateral contracts have been the subject of much discussion, which we do not propose here to repeat. In *Thornton* v. *Kempster*, 5 Taunt. 788, it is said:

"Contracts may exist, which by reason of the Statute of Frauds, could be enforced by one party, although they could not be enforced by the other party. The Statute of Frauds in that respect throws a difficulty in the way of the *evidence*. The objection does not interfere with the substance of the contract, and it is the negligence of the other party that he did not take care to obtain and preserve admissible evidence to enable himself also to enforce it."

The statute of 29 Car. II., c. 3, on which this decision is based, that "no contract for the sale of goods, wares, and merchandise, for the price of £10 sterling or upwards, shall be allowed to be good except the buyer," etc., is in legal effect the same as that of the statute of New York already cited. See *Justice* v. *Lang*, 42 N. Y. 203, that such is the effect of the statute of New York.

The case before us does not fall within this class. There the contract is signed by one party only; here both have signed the paper; and, if a contract is created, it is a mutual one. Both are liable, or neither.

Under these authorities, it seems clear that there can be no sale, unless there is a purchase, as there can be no purchase unless there be a sale. When, therefore, the parties mutually certify and declare in writing that Butler & Co. have sold a certain amount of iron to Thomson & Co. at a price named, there is included therein a certificate and declaration that Thomson & Co. have bought the iron at that price.

In *Radford* v. *Newell*, L. R. 3 C. P. 52, the memorandum was in these words: "Mr. H., 32 sacks culasses at 39s., 280 lbs., to wait orders;" signed, "John Williams." It was objected that it was impossible to tell from this memorandum which party was the buyer, and which was the seller. Parol proof of the situation of the parties was received, and that Williams was the defendant's agent, and made the entry in the plaintiff's books. In answer to the objection the court say, "The plaintiff was a baker who would require the flour, and the defendant a person who was in the habit of selling it;" and the plaintiff recovered. It may be noticed, also, that the memorandum in that case was so formal as to contain no words either of purchase or sale ("Mr. H., 32 sacks culasses at 39s., 280 lbs., to wait orders"); but it was held to create a good contract upon the parol evidence mentioned.

The subject of bought and sold notes was elaborately discussed in the case of *Sievenright* v. *Archibald*, 6 Eng. L. & Eq. 286; *S. C.* 17 Q. B. 103; Benj. on Sales, p. 224, sec. 290. There was a discrepancy in that case between the bought and sold notes. The sold note was for a sale to the defendant of "500 tons Messrs. Dunlop, Winslow & Co.'s pig-iron." The bought note was for "500 tons of Scotch pig-iron." The diversity between the bought and sold notes was held to avoid the

contract. It was held that the subject of the contract was not agreed upon between the parties. It appeared there, and the circumstance is commented on by Mr. Justice Patteson, that the practice is to deliver the bought note to the buyer, and the sold note to the seller. He says, "Each of them, in the language used, purports to be a representation by the broker to the person to whom it is delivered, of what he, the broker, has done as agent for that person. Surely the bought note delivered to the buyer cannot be said to be the memorandum of the contract signed by the buyer's agent, in order that he might be bound thereby; for then it would have been delivered to the seller, not to the buyer, and *vice versa* as to the sold note."

The argument on which the decision below, of the case we are considering, was based, is that the contract of sale is distinct from the contract of purchase; that, to charge the purchaser, the suit should be brought upon the bought note; and that the purchaser can only be held where his agent has signed and delivered to the other party a bought note,—that is, an instrument expressing that he has bought and will pay for the articles specified. Mr. Justice Patteson answers this by the statement that the bought note is always delivered to the buyer, and the sold note to the seller. The plaintiff here has the signature of both parties, and the counterpart delivered to him, and on which he brings his suit, is, according to Mr. Justice Patteson, the proper one for that purpose,—that is, the sold note.

We do not discover in *Justice* v. *Lang*, reported in 42 N. Y. 493, and again in 52 N. Y. 323, anything that conflicts with the views we have expressed, or that gives material aid in deciding the points we have discussed.

The memorandum in question, expressing that the iron had been sold, imported necessarily that it had been bought. The contract was signed by the agent of both parties, the buyer and the seller, and in our opinion was a perfect contract, obligatory upon both the parties thereto.

Judgment reversed, and cause remanded for a new trial.

DOUGHTY ET AL. v. THE MANHATTAN BRASS CO.

(101 New York, 644.—1886.)

Memorandum of opinion:

"The contract upon which the plaintiffs rely is contained in letters written by one or the other party, and the only question upon this appeal is whether their true construction discloses an agreement valid under the statute of frauds. (2 R. S. tit. 2, p. 2, chap. 7, § 3, subd. 1.) The appellant's contention is that 'the contract relied upon is not contained in any note or memorandum subscribed by the defendant,' and as I understand the argument, it rests mainly upon the assumption that the only reference to price is contained in a postscript to the defendant's letter of September 12, 1879, and that this postscript is not subscribed.

"The defendant was a maker of brass hoops, and the plaintiffs, as manufacturers of cedar ware, required that article. Business relations had existed between them for several years, and on the 12th of September, 1879, the defendant wrote concerning certain orders already received, giving some general information relating to the present and probable future price of brass, and duly subscribed the same. Below the signature were these words: 'P. S. Will make price for November and December 17 c. lb.' It is plain that the signature was intended to authenticate the paper, and in such case it is immaterial upon what part it is placed, whether at the beginning or the end, or in the middle. The postscript was an afterthought, but it was verified as effectually for the purposes of correspondence as if written in the body of the letter to which it was added, and into which by reference it may be deemed incorporated. In response to this letter, the plaintiffs, under date of September 15, 1879, gave a written order signed by them for 'two tons of eleven-sixteenths hoop brass November 1, two tons December 1,' and under date of September seventeenth the defendant wrote: 'Your order for November and December to hand and booked.'

"In another written communication dated October 6, 1879, and sent to and received by the plaintiffs, the defendant said: 'We will not fail to ship one thousand pounds per week or more until your order is filled.' These writings were subscribed by

the defendant. If the letter of September twelfth stood alone as containing the contract, it would be necessary to hold that it was not subscribed within the intent of the statute (*James* v. *Patten*, 6 N. Y. 9); but all the letters above referred to are so connected by their contents as together to constitute a note or memorandum for the sale of four tons of hoop brass at seventeen cents per pound, to be delivered one-half November first, and the other half December first. The proposal and final acceptance import a consent of both parties, and create an obligation on the part of the plaintiffs to take and pay for the same, as delivered. It is said, however, by the learned counsel for the appellant, that the order of September fifteenth was indefinite, because it did not specify the required thickness of the hoop, nor a stipulated time of payment. It is apparent, however, that earlier orders had been given and in part filled, and the one in question called for the same article but at a different price. If otherwise, however, there was neither ambiguity in the contract, nor any difficulty in performing it according to its terms. No term of credit was bargained for, and although the complaint alleges that by the agreement payment was to be made on the first of the month after the goods were received, that allegation was not proved, and the question presented was simply one of variance between the complaint and proof which the trial court might properly disregard. We think the note or memorandum sufficient to express a contract. The verdict of the jury, upon evidence sufficient for their consideration, established the breach of that contract by the defendant and damages incurred by the plaintiffs in consequence of it.

"We find no error, therefore, in the judgment appealed from and think it should be affirmed."

COE v. TOUGH.

(116 New York, 273.—1889.)

REPLEVIN to recover possession of property to which plaintiff claims title under the following memoranda of purchase:

"HUDSON, N. Y., Feb. 18th, 1885.

"Mr. E. Frank Coe bought of William Tough.

22 Thomas horse rakes, $21	$462.00
2 Thomas hay tedders, $40	80.00
12 Tiger horse rakes, $21	252.00
1 Rowell leather-top phaeton	75.00
1 Babcock leather-top phaeton	120.00
1 2-seat standing top Eng. spring wagon	90.00
2 Columbus leather-top, side-bar buggies, $117.50	235.00
1 Brockway, end-spring, leather-top buggy	49.00
1 Waterloo end-spring, rubber-top buggy	72.00
	$1,520.00
10 tons E. Frank Coe's phosphate, $28	280.00
	$1,800.00

"The above goods are in my ware-rooms No. 22 Columbia street, Varick street, at store-room of Hudson Agricultural Society, and are well insured."

"HUDSON, N. Y., Feb. 18, 1885.

"E. FRANK COE:

"*Dear Sir:*—In order to liquidate and secure you in the payment of your account as now due, I will propose to do as follows:

Bill of sale of goods inclosed	$1,520.00
10 tons E. Frank Coe's phosphate	280.00
Cash or customer's note in a few days	500.00
Customers' notes or cash	220.00
	$2,500.00
Balance your account to date	1,975.00

"Yours truly,

"WM. TOUGH."

Defendant owed the plaintiff $2,000. The agent of the plaintiff called at defendant's place of business to collect the debt, when the defendant offered to sell and the agent to buy the aforesaid goods on account of the debt, and the above memoranda were written and handed over by the defendant; at the same time the defendant paid the agent $25.00 to be applied on said debt. A few days later the agent returned and requested a delivery of the property; defendant assented and promised to give him a room in which the property could be placed and gave him a key to the room, saying, "if you will come here on the 24th, the goods will then be separated and received by you." The agent returned on the 25th, but the defendant refused to make a delivery of the property.

The defendant had judgment in the court below.

BRADLEY, J. The first question presented is whether there was a valid contract made for the sale of the property by the defendant to plaintiff, and if so, the further question will arise, whether it was an executed one, so as to pass the title to the plaintiff, or was executory merely. As no part of the property was delivered to or received by the plaintiff, and none of the purchase-money paid, as required by the statute of frauds, the sale was void unless a note or memorandum of the contract was made in writing and subscribed by the defendant. (2 R. S. 136, § 3.) The form of the memorandum, as drawn, was "E. Frank Coe bought of William Tough," followed by a list of the articles of property in question with prices added. This paper was not, at the end of it, subscribed by the defendant, so that standing alone, whatever view may be taken of its terms, it was not effectual as a contract of sale. (*James* v. *Patten*, 6 N. Y. 9.) But it is contended that the note or letter written on the same occasion by the defendant, subscribed by him, and addressed to the plaintiff, may be taken in connection with the first-mentioned memorandum, and the signature to the one treated as subscribed to both, each constituting part of the same instrument. To permit this to be done, so as to relieve it from the operation of the statute, the two papers must have been so physically united, or such reference made by one of them to the other, that they may be construed together as one instrument without the aid of oral evidence. (*Baptist Church* v. *Bigelow*, 16 Wend. 28; *Wright* v. *Weeks*, 25 N. Y. 153; *Drake* v. *Seaman*, 97 id. 230;

27 Hun, 63; *Stone* v. *Browning*, 68 N. Y. 598.) The two papers by their date purport to have been made at the same time, they are in the handwriting of the defendant, relate to the same subject, and the reference to the paper designated as a bill of sale in the one, embraces in figures certain amounts corresponding with those in the other. They sufficiently referred to the same transaction to permit them to be construed together, and to be given such effect as they were entitled to. (*Tallman* v. *Franklin*, 14 N. Y. 584; *Peabody* v. *Speyers*, 56 id. 230; *Peck* v. *Vandemark*, 99 id. 29.) The more difficult question arises upon the consideration of the construction and effect, which may be given to those papers. It has been held that a memorandum in the form of that here designated as a bill of sale, with payment receipted, did not constitute a contract of sale so as to exclude parol evidence of warranty, but was a mere receipt. (*Filkins* v. *Whyland*, 24 N. Y. 338.)

While, presumptively, at least, a receipted bill in that form will not have the character of a contract of sale, the effect when no receipt is added may be otherwise. Then it may be such a contract, or the written evidence of it, within the intention of the parties, and entitled to such effect. (*Terry* v. *Wheeler*, 25 N. Y. 520; *Bonesteel* v. *Flack*, 41 Barb. 435.)

That paper, standing alone, not being subscribed by the defendant, had no validity, and in connection with the other it must be treated as referred to for the purpose indicated by the terms of the latter, by which the defendant says that "In order to liquidate and secure you (plaintiff) in the payment of your account as now due, I will propose to do as follows: Bill of sale inclosed $1,520." And then adds another item of property with two items of cash or notes to make up the amount of $2,520. And after stating the balance of the plaintiff's account at $1,975, subscribes his name. In aid of the construction of the instrument, reference may be had to the extrinsic circumstances attending the transaction between the defendant and the plaintiff's agent. The latter called upon the defendant to obtain payment, or security for its payment, of the debt due his principal from the defendant. The interview resulted in an offer of the defendant to sell, and of the agent to purchase, some personal property on account of the debt; and for the purpose of doing so the bill of sale, so-called, was drawn by the defendant, and handed to the agent unsigned.

The note or letter addressed to the plaintiff was written upon the suggestion of the agent that the defendant put on paper a statement, to be taken to the plaintiff, of what had transpired between them. The amount of the prices designated for the articles of property, with that of the proposed cash or notes, was purposely made to exceed the debt, with a view to enable the plaintiff to realize from it the full amount of his account against the defendant. It is not important whether the purpose of the contemplated sale was to pay or secure the payment of the debt. The apparent design, as indicated by the oral evidence, of the transaction, was a sale and purchase, and that the so-called bill of sale was drawn, delivered and received for that purpose. That was not accomplished by it. It is, however, contended that the paper afterwards written, addressed to the plaintiff, and signed by the defendant, was effectual to give to the former the effect of a bill of sale subscribed by the defendant; and that it was not embraced within the executory character of the proposition expressed in the other, but that only the payment or delivery of the cash or notes there mentioned was dependent upon the future action of the defendant. The intention of parties to a written instrument must be derived from it, although its construction may be aided by the light of extrinsic circumstances. When this alleged bill of sale was handed to the plaintiff's agent, it was ineffectual for any purpose, whatever may have been the design of the parties. It does not appear that the other paper was then in contemplation, and its effect must be ascertained from its terms as they may be construed. In its relation to the former it may be assumed that reference was made to the articles of property there mentioned. But it is difficult to distinguish the application of the offer or proposition of the defendant to any one, from any other, portion of the means mentioned for the payment or security of the debt. It was to "liquidate and secure" it as stated. The defendant proposed to do what he had not already done in that respect. He had neither transferred any of the personal property or notes, and had made no contract to that effect. They altogether came within the purpose expressed, and his proposition or promise to accomplish it was in form executory. If the paper called a bill of sale had been independently valid, a different view may have been taken upon construction of the writings. It would, therefore, seem that the support of the

plaintiff's claim of title, requires the conclusion that the offer or promise of the defendant to sell to him the property, was or became effectual for that purpose. It is a rule, as relates to personal property, that when by a valid agreement one party unconditionally agrees to sell to another who agrees to purchase, and nothing remains to be done to complete the sale, the contract will be treated as an executed one, and title will pass although no delivery or payment is made. (*Olyphant* v. *Baker*, 5 Denio, 379; *Terry* v. *Wheeler*, 25 N. Y. 520.) In the present case the proposition or promise of the defendant to sell the property was, by its terms and import, made with a view to the subsequent acceptance by the plaintiff. There cannot, therefore, be said to have been any concurrent undertaking on the part of the latter to purchase.

This proposition, when made, seems to have had no consideration for its support. It was a mere offer of a debtor to sell goods to his creditor in payment or security of the debt due the latter, founded upon no new consideration, but resting solely in the purpose, so manifested of the debtor, to pay the debt or secure its payment in that manner.

The conclusion would seem, for that reason, to follow, that a subsequent acceptance would not be effectual to create a valid contract of sale between the parties. (*Cooke* v. *Oxley*, 3 Durn. & E. 653; *Burnet* v. *Bisco*, 4 Johns. 235; *Utica & Schenectady R. R. Co.* v. *Brinckerhoff*, 21 Wend. 139; *Chicago & G. E. R. Co.* v. *Dane*, 43 N. Y. 240; *Macedon & B. P. R. Co.* v. *Snediker*, 18 Barb. 317.) In that respect this case differs from those determined in *Burrell* v. *Root*, 40 N. Y. 496; *Justice* v. *Lang*, 42 id. 493; 52 id. 323; *Mason* v. *Decker*, 72 id. 595. In those cases the offers and promises of the defendants had the support of consideration, arising out of mutuality of agreement or produced in some other manner.

If these views are correct, there was no valid contract made by the defendant for the sale of the property in question to the plaintiff, to support his claim of title.

The judgment should be affirmed.

All concur, except PARKER, J., not sitting.

Judgment affirmed.[1]

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[1] In *Wright* v. *Weeks*, 25 N. Y. 153, 160–1, Allen, J., says: "The parties cannot unite two papers, so as to make them unitedly constitute a valid

JAMES v. PATTEN ET AL.

(6 New York, 9.—1851.)

ACTION of assumpsit on a special contract for the sale and delivery of a quantity of corn. The memorandum of the contract, in the handwriting of S. Patten, one of the defendants, was as follows:

"ALBANY, March 12th, 1847.

"Mr. THOMAS JAMES bought of M. & S. PATTEN,

"For the relief committee, 3,000 bushels yellow corn (fifty-six pounds per bushel) to be delivered at the opening of the Hudson river navigation at our store in Albany, at 81 cents per bushel, $2,430."

The plaintiff proved the price of the corn and the tender of the same, and the demand and refusal to deliver the corn, and rested his case. The defendants moved for a nonsuit on the ground that the contract was not subscribed by the defendants, and on the ground that it was a contract between the relief committee and the defendants. The judge overruled the motion, and rendered judgment for the plaintiff.

PAIGE, J. The principal question to be decided in this case is, whether the memorandum of the contract entered into between the parties was a valid note or memorandum of such contract within the statute of frauds. The objection made to it is, that it was not subscribed by the defendants, the parties to be charged thereby. The section of the chapter of frauds contained in the revised statutes relative to contracts for the sale of goods and chattels, declares, that every contract for the sale of goods, etc., for the price of $50.00 or more, shall be void; unless, (1) a note or memorandum of such contract be made in writing and be *subscribed* by the parties to be charged thereby; or (2) unless

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contract, unless they are physically joined, or the intention to unite them appears on the face of the papers. If the connection between two papers depends upon verbal testimony, or if the reference in the written memorandum is to something verbal, the whole evil intended to be remedied by statute will be experienced."

the buyer shall accept and receive part of such goods, etc.; or (3) unless the buyer shall at the time pay some part of the purchase-money. (2 R. S. 136, sec. 3.) The old statute of frauds, passed February 26, 1787, as well as the British statute of 29 Charles 2, ch. 3, were substantially in the same words, with the exception of the word "subscribed." (1 Rev. L. of 1813, p. 79, sec. 15; 1 Chit. on Con. 385.) Those statutes required the note or memorandum of the contract to be signed by the parties instead of being subscribed by them. Under the judicial construction of our old statute and of the British statute, it was not necessary to the validity of the contract or of the note or memorandum thereof, that it should be signed underneath or at the end. It was held to be a compliance with the statute, if the name of the party to be charged appeared in any part of the instrument, either at the top, in the middle, or at the bottom, provided it was placed there by the party himself or by his authority, and was applicable to the whole substance of the writing. (*Clason* v. *Bailey*, 14 John. 486; 12 John. 106, 107.) Thus the law stood at the time of the revision. The revisers, in their notes to the 8th section of the 1st title of the chapter of frauds as reported by them, say it had been held, under the former statute of frauds, "that the literal act of signing is not necessary, although the statute speaks of 'signing.' After setting out with this principle, the courts found themselves perfectly at large as to what should be considered a signing. To prevent difficulties of this sort hereafter, the revisers propose to require that these agreements shall be subscribed." The revisers, at the end of the 3d section of the 2d title, which relates to contracts for the sale of goods, and in which they also substituted the word "subscribed" for the word "signed," refer to their notes to the preceding sections. The note to the 8th section of the 1st title, is a plain expression of their understanding of the meaning of the word "subscribed"; and a clear manifestation of their intention in recommending its substitution for the word "signed." It is perfectly clear from the note of the revisers, that they intended by the word "*subscribed*," to require the manual signing of the agreement at the end thereof, by the party to be charged. When the members of the legislature passed upon the sections of the chapter of frauds as reported by the revisers, they had their notes before them, defining the meaning of the word subscribed, and in substance declaring that

the adoption of that word would require an actual manual subscription at the end of the note or memorandum of the contract. The legislature under these circumstances retaining the word "subscribed," as proposed by the revisers, must be understood to have done so, for the purpose of requiring an actual signing in writing of the agreement or memorandum thereof, underneath the same. We cannot now so construe these sections of the chapter of frauds, as to dispense with the necessity of an actual subscription, without disregarding the plainly declared will of the legislature. It is the office of the courts to administer the law as the legislature has declared it; not to alter the law by means of construction, in order to remedy an evil or inconvenience resulting from a fair interpretation of the law. The etymology and definition of the word, *subscribe*, as given by lexicographers, show that its meaning when applied to the signature to an instrument in writing, as understood by men of letters, is the signature or writing of one's name beneath or at the end of the instrument. This is also its popular signification. I am aware that the popular meaning of the word "signed," when applied to a contract or other instrument, is generally writing one's name at the bottom; and that this is sometimes its literal meaning. But this is not so emphatically and universally its meaning, as it is the meaning of the word "subscribed." The derivation of that word from the Latin word *subscribo*, shows that literally and according to its derivation its meaning is "to write under," or "underneath." But this is not the primary or derivative meaning of the verb "to sign." Such meaning is, to write one's name on paper or to show or declare assent or attestation by some sign or mark.

I concede we are not always in the construction of a statute to be controlled by the literary signification of words, or their primary or derivative sense; and that where they have not by long habitual construction received a peculiar or technical meaning, they are to receive their natural and ordinary signification. (*Wain* v. *Warlters*, 5 East, 10.)

In all cases, the intention of the lawmaker in using the words is to be sought after, and when that is ascertained, it must be followed with reason and discretion in the construction of the statute. Whenever any words are obscure or doubtful, the intention of the legislature must be resorted to, in order to find their meaning. (Bac. Ab. Stat. 1, 5.) In the revision of the

statute of frauds, no motive can be assigned for rejecting a word, the legal meaning of which had been established by a long line of adjudications, and substituting another, which had never received a judicial interpretation, but which had a known limited meaning; unless it was to change the law or the construction of the statute, so as to require an actual signing of the name of the party at the end of the contract or of the memorandum thereof, although in common parlance the word "signed" in reference to a contract or other instrument in writing is generally understood as a writing of the name at the bottom; yet now, neither in its ordinary or legal use is it confined to that office; but the word "subscribed," in its habitual use, and according to both its popular and literary signification, is limited to a signature at the end of a printed or written instrument. It has a secondary meaning, but that is purely metaphorical, denoting assent, without reference to any mode of expressing it by actual writing. It seems to me therefore that the legislature, by the substitution of the word "subscribed" for the word "signed," intended a change in substance of the statute of frauds, and to attain a greater degree of certainty in contracts, by requiring an authentication, by an actual subscription of the contract or of the memorandum thereof, by the party to be charged or his lawful agent. This alteration is more than a verbal one, or a mere change of phraseology. It is an alteration in substance; the rejection of a word, which by means of judicial interpretation, had an extensive legal signification; and the adoption of another in its place which had in its popular and literary use, and according to the general popular understanding, a known limited meaning. According to the familiar rules of construction, this substituted word must receive its natural and ordinary signification. 5 East, 10; Bac. Ab. Stat. 1. 2. And if that is accorded to it, the contract or memorandum must now be authenticated by a manual signature at the end. In neither a popular, literary nor legal sense, are the words "signed" and "subscribed" synonymous, or of equivalent meaning. In the case of *Merritt* v. *Clason*, 12 Johns. 102, it was conceded by the eminent counsel, who argued that case, that there was a plain distinction between signing and subscribing.

Mr. Wells says "signing does not *ex vi termini* mean that the name of the party should be subscribed." Mr. D. B. Ogden

replies, "I do not say that the agreement must be subscribed, but that it must be signed in some part of the contract."

I do not think that all the foregoing arguments can be overthrown by the mere circumstance that the legislature in the chapter in relation to wills, from abundant and unnecessary caution, added to the provision requiring the will to be subscribed by the testator, the words, "at the end of the will." The chapter in relation to wills was acted upon previous to the enactment of the chapter in relation to fraudulent conveyances and contracts. When the latter chapter was examined and passed, the legislature had the notes of the revisers before them which explained the distinction between the words *signed* and *subscribed*; and, I think, we must presume that the word "*subscribed*" was adopted in reference to its meaning as defined by the revisers.

This question was expressly determined by the court of errors in *Davis* v. *Shields*, 26 Wend. 341, and is therefore no longer open for debate. In that case it was elaborately and learnedly discussed by the late chancellor and by Senator Verplanck, and both of them came to the conclusion that the word "subscribed" as used in the statute of frauds, requires an actual signing in writing of the name of the party who is to make a sale of an interest in lands or to be charged by a contract for the sale of goods, at the end of the contract or of the memorandum thereof. The ground on which the binding force of this decision is sought to be evaded or overthrown is, in my judgment, unsound. The argument is, that inasmuch as Chancellor Walworth and Senator Verplanck examined two questions in that cause; (1) Whether as the memorandum of the broker, varied from the contract made by the parties, there was a contract binding on either party; and (2) Whether the word "subscribed" required an actual signing of the name of the party to be charged at the end of the contract or memorandum; and as all the other members of the court with one exception voted silently with them to reverse the judgment of the supreme court, that it is impossible to discover on which of the two questions a majority of the court voted for such reversal; although Chancellor Walworth and Senator Verplanck agreed that both of the questions were erroneously decided by the supreme court.

If this argument is to prevail, it will unsettle a great portion of our law, which, by universal consent, has been regarded as definitely established. If in a case like that of *Davis* v. *Shields*, it

is held that no point of law was decided, then no case is authority for any purpose which is decided by a court consisting of more than one judge, where one member of the court only delivers a written opinion, disposing of several questions distinctly arising in the cause, the decision of each of which is fatal to the recovery or defense, and the other members of the court concur without respectively declaring their individual views in regard to any of the questions discussed in such opinion. Such a doctrine is opposed to the general understanding of the bar, and to the uniform practice of the courts in recognizing such cases as binding authority as to all the questions which legitimately arose in the cause, and were passed upon by the judge who delivered the written opinion. Where a court consists of several judges, two or more of whom deliver opinions, and all arrive at the same general result in the cause, but for different reasons, and the residue of the judges give a silent vote of concurrence with them, in a decision for the one party or the other; there, as it does not appear that a majority of the court agreed as to any one question in particular as the ground of the decision, the case cannot be considered as authority on any of the questions which arose in the cause. But where several questions arise in the cause, and the opinions delivered agree in regard to all of them, and the other members of the court give a silent vote of concurrence, there all the questions will be deemed to have been determined by a majority of the court, and the case will be regarded and respected as an authoritative adjudication of all such questions.

It has been held by several of the courts of this state, that the case of *Davis* v. *Shields*, 26 Wend. 341, expressly determined that the word "subscribed," in the chapter of the revised statutes in relation to fraudulent conveyances and contracts, called for an actual subscription of the name of the party at the end of the contract. Chancellor Walworth so held in *Cole* v. *Bowne*, 10 Paige, 537, and in *Champlin* v. *Parish*, 11 Paige, 410, 411; and a like decision was made by the supreme court for the fourth district, in *Vielie* v. *Osgood*, 8 Barb. S. C. R. 134. As a member of the senate, I took a part in the decision of the case of *Davis* v. *Shields;* and at the time that cause was decided, I had no doubt, nor have I any now, that a majority of the court, in voting for a reversal of the judgment of the supreme court, concurred with Chancellor Walworth and Senator Ver-

planck as to both of the questions discussed in their opinions. I dissented from the opinion of the majority of the court, on the ground that the legislature, by substituting the word "subscribed" for the word "signed," used in the former statute of frauds, did not intend to change the law. From my present examination of this question, I am satisfied that I was mistaken in the opinion I then expressed.

I am of opinion that the judgment of the supreme court should be reversed, and a new trial granted.

Judgment reversed.

(Concurring opinion of GARDINER, J., omitted.)

VINCENT v. GERMOND ET AL.

(11 Johnson, 283.—1814.)

THIS was an action of *assumpsit* for cattle, etc., sold and delivered, and was tried at the *Dutchess* circuit, New York, in November, 1813.

It was proved at the trial that in *June*, 1812, *B. Germond*, one of the defendants, came to the plaintiff and asked him if he had any cattle to sell, and the plaintiff replying in the affirmative they went together into the field to look at them. *B. Germond* offered $280 for the cattle, *four* in number, which, after some hesitation, the plaintiff agreed to accept, if they were at *B. G.'s* risk, observing that he had had one or two cattle injured by the clover in the field where the cattle were feeding. *B. Germond* replied, that he took them at his own risk, and the cattle must remain where they were; that he would call and take them away as soon as he had completed his *drove*. After the bargain was concluded, the cattle so purchased continued in the same field, with other cattle of the plaintiff; in a few days one of them died, being injured by the clover. On the 4th of *July* following, *James Germond*, the other defendant, came alone to the field and took away the three remaining cattle, without saying anything to the plaintiff.

The defendants gave some evidence of a *tender* to the plain-

tiff, in *June*, 1813, of the price of the three cattle left. It was agreed, that $231 was a sufficient compensation for the three cattle.

A verdict was taken for the plaintiff for $311.03, being the price of the *four* cattle, with *interest.*

PER CURIAM. No earnest money having been paid, nor any writing made between the parties relative to the contract, the question is, whether there was such a delivery of the cattle as to take the case out of the statute of frauds. It was not made a question whether the defendants were partners, so as to be bound by the acts of each other. It may be questioned whether what took place between *B. Germond* and the plaintiff, if standing alone, would amount to a delivery; but the subsequent conduct of the other defendant, in taking away the three oxen, without any new contract, affords sufficient ground to infer a delivery. This was the exercise of an act of ownership over the property, in confirmation of the bargain. The defendants dealt with the oxen as their own, and as if in their actual possession, without asking any permission from the plaintiff for so doing. This must have been done in virtue of the right acquired by the original contract and transfer of the property. Such exercise of ownership, by selling part of the property, was, in the case of *Chaplin* v. *Rogers*, 1 East, 192, held a sufficient delivery to take the case out of the statute. And the case of *Elmore* v. *Stone*, 1 Taunt. Rep. 457, is much stronger on this point. It was there held that an agreement between the parties, that the vendor should keep the horses sold, for the vendee, at livery, was sufficient to vest the property in the buyer, without any written contract or earnest paid. The opinion of the court, upon this point, renders it unnecessary to notice the other question made in the case. The plaintiff must, accordingly, have judgment upon the verdict for three hundred and eleven dollars and three cents.

Judgment for the plaintiff.[1]

[1] See University Law Review, I., 12, on the question of delivery and acceptance under the Statute of Frauds.

Bill v. Bament.

(9 Meeson & Welsby, 36.—1841.)

Assumpsit for goods sold and delivered, and on an account stated. Plea, non assumpsit. At the trial . . . the following facts appeared:

The defendant ordered of one Harvey, who was an agent of the plaintiff under a del credere commission, a quantity of goods, including twenty dozen hair-brushes and twelve dozen clothes-brushes, to be paid for on delivery at a stipulated price; but no memorandum in writing of the bargain was made at the time. On receiving notice from Harvey that the brushes had arrived at his warehouse, the defendant, on the 22d of March last, went there, and directed a boy, whom he saw there, to alter the mark "No. 1," upon one of the packages, to "No. 12," and to send the whole of the goods to the St. Catharine's Docks. The next day, an invoice was delivered to the defendant, charging the brushes respectively at the rate of 8 s. and 12 s. *each*. The defendant objected to this price, alleging that by the contract, as he had understood it, the above were to be the prices of the brushes *per dozen;* and refused to pay for them. On the 24th of March, the plaintiff commenced the present action for the price. On the 27th, the defendant, at Harvey's request, wrote in Harvey's ledger, at the bottom of the page which contained the statement of the articles ordered by the defendant, and which page was headed "Bill & Co.," the following words: "Received the above, John Bament." The rest of the goods were sent to and received by the defendant. It was objected for the defendant, that there was no evidence of any contract in writing, or of any acceptance of the brushes, sufficient to satisfy the 17th section of the Statute of Frauds. The Lord Chief Baron reserved the point, leave being reserved to the defendant to move to enter a nonsuit.

Lord Abinger, C. B. If the question at the trial had turned altogether upon the acceptance, I should then have formed the same opinion as I do now. In order to make it such an acceptance as to satisfy the statute, it should appear that there was a *delivery*. Here Harvey was the plaintiff's

agent, and sold for ready money; and he was not bound to deliver the goods until payment of the price. Now all that takes place is a direction by the defendant to alter the mark on the goods, and to send them to the docks; but the question is, whether this was done under such circumstances, and Harvey stood in such a situation, as that he was *bound* to send them to the docks. The acceptance, to be effectual under the statute, should be such as to divest the property in the goods out of the seller. Here the defendant probably meant to accept them, and to make Harvey his agent for shipping them. But can it be said that he was his agent to deliver at all events? I think clearly not. He was at liberty to say that he would not deliver to or ship for the defendant until the goods were paid for. There is nothing to show that he contracted to hold them as the defendant's agent, or by implication to make him his agent. Therefore, for want of a *delivery*, there was no sufficient *acceptance* of these goods. The rule will be absolute, but not for a nonsuit, as it appears that some goods were received by the defendant, but for a new trial on payment of costs by the plaintiff.

PARKE, B. I concur in thinking that there was no evidence to go to the jury to satisfy the Statute of Frauds. With regard to the point which has been made by Mr. Martin, that a memorandum in writing after action brought is sufficient, it is certainly quite a new point, but I am clearly of opinion that it is untenable. There must, in order to sustain the action, be a *good contract* in existence at the time of action brought; and to make it a good contract under the statute, there must be one of the three requisites therein mentioned. I think, therefore, that a written memorandum, or part payment, after action brought, is not sufficient to satisfy the statute. Then, to take the case out of the 17th section, there must be both *delivery* and *acceptance;* and the question is, whether they have been proved in the present case. I think they have not. I agree there was evidence for the jury of acceptance, or rather of intended acceptance. The direction to mark the goods was evidence to go to the jury *quo animo* the defendant took possession of them; so also, the receipt was some evidence of an acceptance. But there must also be a *delivery;* and to constitute that, the possession must have been parted with by the owner, so as to de-

prive him of the right of lien. Harvey might have agreed to hold the goods as the warehouseman of the defendant, so as to deprive himself of the right to refuse to deliver them without payment of the price; but of that there was no proof. There was no evidence of actual marking of the goods, or that the order to mark was assented to by Harvey. I am of opinion, therefore, that there was no sufficient proof of acceptance to satisfy the statute, and that the case falls within the 17th section.

GURNEY, B., and ROLFE, B., concurred.

Rule absolute accordingly.

CROSS ET AL. v. O'DONNELL ET AL.

(44 New York, 661.—1871.)

PLAINTIFFS, doing business in Baltimore, agreed to sell to the defendants, doing business in New York, 24,000 barrel hoops at $11.50 per 1,000, and to deliver them at the steamer *Curlew* for New York. A member of defendants' firm saw the hoops in plaintiffs' yard, and after looking at them said he would buy them.

Plaintiffs then delivered the 24,000 hoops to said steamer, took a bill of lading therefor, and consigned the hoops to the defendants at New York. On the way, the steamer was sunk in Chesapeake bay, and the cargo was lost.

In an action to recover the purchase price, verdict was entered in favor of the plaintiffs, and judgment entered thereon was affirmed at the General Term of the New York Common Pleas.

EARL, C. On the trial, after proving that the statute of frauds in force in Maryland was substantially like our own, the defendants moved that the plaintiff be nonsuited, on the ground that the contract of sale was void by that statute, and the court denied the motion; and this ruling raises the only question for our consideration in this case.

There was no note or memorandum of the contract, and no part of the purchase-money was paid by the buyers; and, hence, unless the buyers accepted and received the hoops, within the

meaning of the statute, the contract was void. A purchaser may accept without receiving, and he may receive without accepting; and, in order to comply with the statute of frauds, he must both accept and receive. Here the defendants accepted the hoops. One of them saw them in plaintiffs' yard; and the contract had reference to this particular lot of hoops which the plaintiffs finally delivered. There is nothing in the statute which requires that the accepting and receiving shall be at the same time. Either may precede the other; and, after both have concurred, the statute has been complied with and the contract becomes operative and valid. (*McKnight* v. *Dunlop*, 5 N. Y. 537.) The defendants agreed to take these identical hoops, and, after receiving them and thus fully complying with the statute, they could not reject them upon any objection to their quality. The only question, then, is, did they receive them, within the meaning of the statute? And this involves the inquiry, whether, in a case where the purchaser has accepted the goods, a delivery to a carrier designated by himself will answer the requirement of the statute as to receiving the goods by the purchaser. I am of opinion that it will. It has finally been settled, both in this country and in England, that a delivery to a general carrier, not designated by the purchaser, is not a sufficient compliance with the statute (*Rodgers* v. *Phillips*, 40 N. Y. 519); and for the best of reasons. In such a case the purchaser has done nothing beyond making the void contract. But, in this case, the purchasers designated the agents of the *Curlew* to receive and transport the hoops to them. They were the agents of the defendants for the purpose of receiving the hoops from the plaintiffs.

It is not necessary to determine in this case that a mere carrier, designated by the buyer, can both accept and receive for him, so as to make a compliance with the statutes; but I can find no reason founded upon principle, or authority, to doubt that, after the buyer has accepted the article purchased, a carrier, designated by him to take and transport it, can bind him as his agent by receiving it. While there is not upon this question entire harmony in the views of judges, and while the authorities cannot all be reconciled, the general drift of them is toward the conclusion I have reached. (2 Parsons on Con. 326; *Outwater* v. *Dodge*, 6 Wend. 397; *The People* v. *Haynes*, 14 Wend. 546; *Glen* v. *Whitaker*, 51 Barb. 451; *Spencer* v. *Hale*, 30 Vermont, 314; *Maxwell* v. *Brown*, 39 Maine, 98; *Han-*

som v. *Armitage*, 5 Barn. & Ald. 557; *Acebal* v. *Levi*, 25 Eng. C. L. 170; *Coats* v. *Chaplin*, 43 Eng. C. L. 831; *Morton* v. *Tibbett*, 69 Eng. C. L. 427.)

It is said by some writers, that to create such an appropriation of the goods by the buyer as will answer the meaning attached to the words "accept and receive" in the statute, there must be such an actual delivery by the seller as will destroy all lien for the purchase-price, or right of stoppage *in transitu*. This, to the full extent, is not true. The seller has a lien for the purchase-price of the goods while they remain in his possession. And this lien he loses when he voluntarily parts with the possession, except when he delivers them to a carrier. In the latter case, his lien is extended and lasts, although the title has passed to the buyer, until the carrier has delivered the goods to the actual possession of the buyer. This lien is an arbitrary one, created by law. As observed by Lord Kenyon, in *Hodgson* v. *Lay*, 7 T. R. 436, it is "a kind of equitable lien adopted by the law for the purpose of substantial justice." When the seller retakes the property in the exercise of this right of stoppage, he is not reinvested with the title, but simply placed in the actual possession of the goods, holding them as security for the purchase-price.

The stoppage must be while the goods are *in transitu*, and that is usually when they are not in the actual possession of either party; and yet they may be in the actual possession of the buyer under such circumstances as not to take away the right of stoppage. This right exists, although the goods are shipped upon the buyer's own vessel, consigned to him at his place of residence. (*Stubbs* v. *Lund*, 7 Mass. 453; *Ilsley* v. *Stubbs*, 9 Mass. 65; Story on Sales, § 336.) The fact that the right of stoppage exists is no evidence that both the title and possession have not passed to the buyers. The contract of sale may be in writing, part of the purchase-money may have been paid, and there may have been a part delivery, and yet, if the seller consigns the goods by a carrier to the buyer, to be delivered to him at the place of their destination, the right of stoppage exists. And this may be so, even if the buyer is also master of the vessel, and he in person takes the goods and loads them upon his own vessel, provided, as in this case, the seller consigns the goods to the buyer to be carried by him to their place of destination. (Pars. on Mer. Law, 335, etc.)

Hence I hold that a carrier designated by the buyer may receive the goods purchased, so as to make a compliance with the statute of frauds; and this leads to an affirmance of the judgment.

All concur.

Judgment affirmed with costs.

CAULKINS ET AL. v. HELLMAN.

(47 New York, 449.—1872.)

ACTION to recover the contract price of certain cases of wine, sold under an oral agreement, and alleged to have been delivered by plaintiffs to defendants.

RAPALLO, J. The instructions to the jury as to the legal effect of the delivery of the wine at Blood's Station in conformity with the terms of the verbal contract of sale, were clearly erroneous. No act of the vendor alone, in performance of a contract of sale void by the statute of frauds, can give validity to such a contract.

Where a valid contract of sale is made in writing, a delivery pursuant to such contract at the place agreed upon for delivery, or a shipment of the goods in conformity with the terms of the contract, will pass the title to the vendee without any receipt or acceptance of the goods by him. But if the contract is oral, and no part of the price is paid by the vendee, there must be not only a delivery of the goods by the vendor, but a receipt and acceptance of them by the vendee to pass the title or make the vendee liable for the price; and this acceptance must be voluntary and unconditional. Even the receipt of the goods, without an acceptance, is not sufficient. Some act or conduct on the part of the vendee, or his authorized agent, manifesting an intention to accept the goods as a performance of the contract, and to appropriate them, is required to supply the place of a written contract. This distinction seems to have been overlooked in the charge. The learned judge instructed the jury, as a matter of law, that if they were satisfied that the wine or any portion of it was actually delivered in pursuance of the

verbal contract, that circumstance was sufficient to take the contract out of the statute of frauds, and the contract was a valid one, and might be enforced, notwithstanding it was not in writing. The attention of the jury was directed to the inquiry whether the plaintiffs had faithfully performed their part of the contract, rather than to the action of the defendant, and the judge proceeded to state that if the wine was delivered to the express company at Blood's Station, in good order, in merchantable condition, and corresponded in quality and all substantial and material respects with the samples, then he instructed the jury, as a matter of law, that if they found the contract as Gordon testified, with respect to the place of delivery, that was a complete delivery under the contract, and passed the title from the plaintiffs to the defendant, and the plaintiffs were entitled to recover the contract price of the wines.

The plaintiffs' counsel suggests, in the statement of facts appended to his points, that Gordon was the agent of the defendant, to accept the goods at Blood's Station. But this statement is not borne out by the evidence; Gordon was the agent of the plaintiffs, for the sale of the goods; it was incumbent upon them to make the shipment. All that Gordon testifies to is, that the defendant requested him to make the best bargain he could for the freight. He does not claim that he had any authority to accept the goods for the defendant.

According to the defendant's testimony, Gordon clearly had no such authority, nor did the defendant designate any conveyance, and the judge submitted no question to the jury as to the authority either of Gordon or the express company to accept the goods. On the contrary, he repeated that if, when the wine was delivered at Blood's Station, it was in good order and corresponded with the samples, the plaintiffs would be entitled to a verdict for the contract price, upon the ground that the parties, by the contract, (assuming it to be as claimed by the plaintiffs) fixed upon that station as the place of delivery; "that it was true that the defendant was not there to receive it, and had no agent at Blood's Station to receive it, and had no opportunity to inspect it there; but that that was a contingency he had not seen, and which he might have guarded against in the contract."

It is evident that the learned judge applied to this case the

rule, as to delivery, which would be applicable to a valid, written contract of sale, but which is inapplicable when the contract is void by the statute of frauds.

The effect of the delivery of goods at a railway station, to be forwarded to the vendee in pursuance of the terms of a verbal contract of sale, was very fully discussed in the case of *Norman* v. *Phillips*, 14 Meeson & Welsby, 277, and a verdict for the plaintiff, founded upon such a delivery, and upon the additional fact, that the vendor sent an invoice to the vendee, which he retained for several weeks, was set aside. The English authorities on the subject are reviewed in that case, and the American and English authorities bearing upon the same question are also referred to in the late cases of *Rodgers* v. *Phillips*, 40 N. Y. 519, and *Cross* v. *O'Donnell*, 44 id. 661. The latter case is cited by the counsel for the plaintiffs as an authority for the proposition that a delivery to a designated carrier is sufficient to take the case out of the statute; but it does not so decide. It holds only that the receipt and acceptance need not be simultaneous, but that they may take place at different times, and that, after the purchaser had himself inspected and accepted the goods purchased, the delivery of them by his direction to a designated carrier was a good delivery, and the carrier was the agent of the purchaser to receive them. No question, however, arises in the present case as to a delivery to a designated carrier, as the evidence in respect to the agreed mode of delivery is conflicting, and no question of acceptance by the carrier as agent for the defendant, was submitted to the jury.

The judge submitted to the jury two questions, to which he required specific answers:

1st. Was the wine delivered at the railroad station at the time agreed upon by the parties, and was it then in all respects in good order, and like the samples exhibited by the plaintiffs to the defendant? and,

2d. Was the wine accepted by the defendant after it reached his place of business in New York?

The jury answered both of these questions in the affirmative, and it is now claimed that the answer to the second question renders immaterial any error the judge may have committed in respect to the effect of the delivery at the station.

It is difficult to find any evidence justifying the submission to the jury of the second question; but no exception was taken

to such submission. The motion for a nonsuit would have raised that point, were it not for the fact that there was evidence to go to the jury on the claim of fifty-two dollars for barrels, and this precluded a nonsuit. We think, however, that the error in the charge may have misled the jury in passing upon the second question; at all events, it is not impossible that it should have done so. Having been instructed that upon the fact as they found it in respect to the agreeement for a delivery at Blood's Station, the title to the goods had passed to the defendant before the receipt of them at New York, and that their verdict must be for the plaintiffs, they may have examined the question of his acceptance of them at New York with less scrutiny than they would have exercised had they been informed that the result of the case depended upon their finding on that question. And the construction of the defendant's acts and language may, in some degree, have been influenced by the consideration that when the wine arrived in New York the title had, according to the theory on which the case was submitted to them, passed to the defendant, and he had no right to reject the wines. Furthermore, we think the judge erred in excluding the evidence of the contents of the telegram which the defendant attempted to send to the plaintiffs immediately upon the receipt of the wine. If, as was offered to be shown, it stated that he declined to accept the wine, it was material as part of the *res gestæ*. A *bona fide* attempt, immediately on the receipt and examination of the wine, to communicate such a message, was an act on his part explaining and qualifying his conduct in receiving the wine into his store and allowing it to remain there. And even though the message never reached the plaintiffs, it bore upon the question of acceptance by the defendant. The objection to the evidence of the contents of the telegram was not placed on the ground of omission to produce the original, and the judge in his charge instructed the jury that the attempt to send this telegram did not affect the plaintiffs' rights, for the reason that it was not shown to have been received by them, and this was excepted to. In *Norman* v. *Phillips*, 14 Meeson & Welsby, 277, the defendant was allowed to prove that, on being informed by the railway clerk that the goods were lying for him at the station, he said he would not take them, and stress was laid upon the fact. Yet this statement to the clerk was not communicated to the plaintiff. Evidence

of an attempt to send a message to them to the same effect, though unsuccessful, would have been no more objectionable than the declaration to the clerk. The acts of the defendant at the time of the receipt of the goods, and his *bona fide* attempt to communicate to the plaintiffs his rejection of them, were, I think, material and competent to rebut any presumption of an acceptance arising from their retention by him.

The judge was requested to instruct the jury that the true meaning of the defendant's letter of March thirty-first was a refusal to accept the wine under the contract. A careful examination of that letter satisfies us that the defendant was entitled to have the jury thus instructed. The letter clearly shows that the defendant did not accept or appropriate the wines. After complaining in strong language of their quality and condition, and of the time and manner of their shipment, he says to the plaintiffs, "what can be done now with the wine after it suffered so much, and shows itself of such a poor quality? I don't know, myself, and am awaiting your advice and opinion." He concludes by expressing his regret that their first direct transaction should have turned out so unsatisfactory, and by stating that he cannot be the sufferer by it, and he awaits their disposition.

This language clearly indicates an intention to throw upon the plaintiffs the responsibility of directing what should be done with the wine, and is inconsistent with any acceptance or appropriation of it by the writer.

For these reasons the judgment should be reversed, and a new trial granted with costs to abide the event.

All concur.

Judgment reversed.

ALLARD ET AL. v. GREASERT ET AL.

(61 New York, 1.—1874.)

THE defendants agreed with plaintiffs' agent to purchase the following goods at prices named, and according to samples shown:

No. 361, ½ doz. child's Leghorn sylvans . .	$ 5.50
No. 312, 1 doz. harvest hats	4.50
No. 371, ½ doz. Panama hats	14.25
No. 372, ½ doz. Panama hats	18.00
No. 326, 1 doz. palm leaf hats	2.50
No. 324, 1 doz. palm leaf hats	3.00
No. 329, 1 doz. white Glenwood . . .	15.00
No. 159, 1 doz. black Alpine	24.00
No. 309, 1 doz. Leg. harvest	3.25

The goods were subsequently shipped to the defendants, according to instructions. The defendants, however, declined to receive the goods, because one dozen harvest hats were not like the sample, and so notified the plaintiffs.

In an action to recover for goods sold and delivered, the plaintiffs were nonsuited on the ground that the contract of sale was not severable, and the plaintiffs had failed to perform their part of the agreement.

EARL, C. The judge at the circuit regarded this as an entire contract of sale, and not severable; and if he was right in this, he properly nonsuited the plaintiffs upon that ground. If it was an entire contract, within the meaning of the law, the plaintiffs could recover only by showing entire performance, by a full delivery of all the articles purchased. But it is not necessary, in this case, to determine whether this was an entire or a severable contract, because the defendants also moved for a nonsuit upon the ground that the contract of sale was void under the statute of frauds. Although the judge did not place the nonsuit upon this ground, it may be considered here. He nonsuited the plaintiffs, and, even if he gave a wrong reason for it, and placed it upon the wrong ground, the nonsuit may be upheld upon any ground appearing in the case. (*Curtis* v.

Hubbard, 1 Hill, 336; *Simar* v. *Canaday*, 53 N. Y. 298; *Deland* v. *Richardson*, 4 Den. 95.)

Even if this were a severable contract so far as relates to the performance of the same, within the meaning of the statute of frauds it is an entire contract. The reasons for holding it to be such are clearly set forth in *Baldey* v. *Parker*, 2 B. & C. 41 and Story on Sales, § 241. This, within the meaning of the statute of frauds, is a contract for the sale of goods for the price of fifty dollars or more, and as there was no note or memorandum or payment, the question to be determined is, whether the goods were accepted and received by the buyers so as to satisfy the statute. By the terms of the contract, the goods were to be delivered to the Merchants' Union Express to be carried to the defendants, and they were so delivered. It is well settled that when there is a valid contract of sale, a delivery to a carrier, according to the terms of the contract, vests the title to the property in the buyer. It was decided, in *Rogers* v. *Phillips*, 40 N. Y. 519, that a delivery, according to the contract, to a general carrier, not designated or selected by the buyer, does not constitute such a delivery and acceptance as to answer the statute of frauds. But it has been held that when the goods have been accepted by the buyer, so as to answer that portion of the statute which requires *acceptance*, a delivery to a carrier selected by the buyer will answer that portion of the statute which requires the buyer to receive. (*Cross* v. *O'Donnell*, 44 N. Y. 661.) So far as I can discover, it has never yet been decided in any case that is entitled to respect as authority, that a mere carrier designated by the buyer can both accept and receive the goods so as to answer the statute. (Benj. on Sales, 124.) The cases upon this subject are cited and commented upon, and the principles applicable to the question are so fully set forth in the two recent cases above referred to that no further citation of authorities or extended discussion is, at this time, important. It will be found, by an examination of the authorities, that, in most cases, where a delivery to a carrier has been held to satisfy the statute of frauds there had been a prior acceptance of the goods by the buyer or his agent. A buyer may accept and receive through an agent expressly or impliedly appointed for that purpose. There is every reason for holding that a designated carrier may receive for the buyer, because he is expressly authorized to receive, and the act of receiving is a

mere formal act, requiring the exercise of no discretion. But there is no reason for holding that the buyer, in such case, intended to clothe the carrier, of whose agents he may know nothing, with authority to accept the goods, so as to conclude him as to their quality, and bind him to take them as a compliance with a contract of which such agents can know nothing. This case furnishes as good an illustration as any. The goods were boxed; the carrier could know nothing about them; and its agents had no right to unpack and handle them. Its sole duty and authority was to receive and transport them. In such a case, it would be quite absurd to hold that the carrier had an implied authority from the buyer to accept the goods for him. If the buyer does not accept in person, he must do it through an authorized agent. Here it is not claimed that there was ex press authority conferred upon the carrier to accept, and the circumstances are not such that such authority can be implied.

Upon this last ground, therefore, the nonsuit was proper, and the judgment must be affirmed, with costs.

All concur.

Judgment affirmed.

SAFFORD ET AL. v. MCDONOUGH.

(120 Massachusetts, 290.—1876.)

MORTON, J. This is an action of contract to recover the price of a quantity of leather, exceeding fifty dollars in value, alleged to have been sold by the plaintiffs to the defendant. There was no memorandum in writing of the contract, and the purchaser did not give anything in earnest to bind the bargain or in part payment.

It appeared on the trial that the defendant on May 17, 1872, went to the plaintiffs' store and agreed to purchase the leather at the price named, to be paid for by a satisfactory note.

On the thirty-first day of the same month, he again went to the plaintiffs' store, examined the leather, had it weighed, marked with the initials of his name, and piled up by itself, to be taken away by him upon giving a satisfactory note for the price, or the payment of the price in money, but not otherwise.

He never complied with the terms of the agreement. The plaintiffs refused to allow him to take the leather from their store without such compliance, claiming a lien upon it for the price due. It remained in their store till November 9, 1872, when it was burnt with the store. Upon this evidence the presiding justice of the Superior Court ruled that the leather had not been so accepted and received by the defendant as to take the contract out of the statute of frauds, and the plaintiff excepted to such ruling.

It should be kept in mind that the question is not whether, if a valid contract of sale upon the terms above-named had been proved, the title in the property would have passed to the defendant so that it would be at his risk. In such a case, the title would pass to the purchaser unless there was some agreement to the contrary, but the vendor would have a lien for the price, and could retain possession until its payment. *Haskins* v. *Warren*, 115 Mass. 514; *Morse* v. *Sherman*, 106 Mass. 430; *Townsend* v. *Hargraves*, 118 Mass. 325. But the question is whether the defendant had accepted and received the goods, so as to take the case out of the statute of frauds, and thus complete and make valid the oral contract relied on. Unless there was such acceptance and receipt, there was no valid contract by virtue of which the title to the goods would pass to the defendant. To constitute this, there must be a delivery by the seller, and some unequivocal acts of ownership or control of the goods on the part of the purchaser. *Knight* v. *Mann*, 118 Mass. 143, and cases cited.

In the case at bar, there was no actual acceptance and receipt of the goods by the defendant. They were never in his possession or control, but remained in the possession and control of the plaintiffs, who refused to allow him to take them, claiming a lien for the price. If they had and asserted a lien as vendors, this is inconsistent with the delivery of possession and control, necessary to constitute an acceptance and receipt by the vendee. In *Baldey* v. *Parker*, 2 B. & C. 37, 44, Holroyd, J., says: "Upon a sale of specific goods for a specific price, by parting with the possession the seller parts with his lien. The statute contemplates such a parting with the possession, and therefore, as long as the seller preserves his control over the goods, so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute."

Benjamin on Sales (Am. ed.), 151, and cases cited. Brown on St. of Frauds, § 317.

It is true there may be cases in which the goods remain in the possession of the vendor, and yet may have been accepted and received by the vendee. But in such cases the vendor holds possession of the goods, not by virtue of his lien as vendor, but under some new contract by which the relations of the parties are changed. *Cusack* v. *Robinson*, 1 B. & S. 299, 308; *Castle* v. *Sworder*, 6 H. & N. 828; *Dodsley* v. *Varley*, 12 A. & E. 632.

In the case at bar, the vendors refused to permit the vendee to take possession or control of the goods but claimed and asserted their lien as vendors for the price. We are therefore of opinion that the ruling of the Superior Court was correct.

Exceptions overruled.

HOWE v. HAYWARD.

(108 Massachusetts, 54.—1871.)

CHAPMAN, C. J. It appears by the report, that the parties made an oral contract for the sale of property by the plaintiff to the defendant, and that each of them deposited the sum of $200 in the hands of one Taft. The plaintiff contended that the money deposited by the defendant was given in earnest to bind the bargain, or in part payment. The defendant contended that it was under an agreement that the sum should be forfeited in case he refused without just cause to perform the contract. The jury found that it was not deposited in earnest or in part payment, but was deposited "as a forfeiture, to be paid over to the party who was ready to perform the contract, if the other party neglected to do so;" and under the instruction of the court found for the defendant. The plaintiff contends that the finding should have been for the plaintiff, because, if the money was deposited as a forfeiture, as stated, it amounted to "earnest," within the meaning of the statute of frauds. This depends upon the proper definition of that term as used in the statute.

The idea of "earnest," in connection with contracts, was taken from the civil law. Güterbock on Bracton (Am. transl.),

145. It is not necessary to consider its precise effect under that law. As used in the statute of frauds, "earnest" is regarded as a part payment of the price. 2 Bl. Com. 447; *Pordage* v. *Cole*, 1 Saund. 319*b*; *Langfort* v. *Tiler*, 1 Salk. 113; *Morton* v. *Tibbett*, 15 Q. B. 428; *Walker* v. *Nussey*, 16 M. & W. 302; 1 Dane, Ab. 235. The case of *Blenkinsop* v. *Clayton*, 7 Taunt. 597, cited by the plaintiff, turned on the question of delivery.

The deposit with Taft was not therefore equivalent to an earnest to bind the bargain, or part payment, and there was not a valid sale within the statute of frauds. The ruling was correct.

Judgment on the verdict.

Hunter v. Wetsell et al.

(57 New York, 375.—1874.)

Earl, C. This action was brought to recover the price of hops which plaintiff claims to have sold to the defendants. It is claimed, on the part of the defendants, that the contract was void under the statute of frauds, and whether it was or not is the only question I propose to consider.

The only compliance with the statute claimed is part payment of the purchase-price. The facts are as follows: The contract was made September 27, 1867, and no portion of the purchase-price was then paid. Subsequently, the defendants paid the plaintiff $300 upon the purchase-price, $200 in November and $100 in December. There is no proof of what was said about the hops or the contract when these payments were made. The evidence does not even show that the contract was mentioned or referred to. It is simply, that the payments were made toward the hops.

The English statute of frauds, enacted in the reign of Charles the Second, did not require the payment, to render a contract for the sale of goods valid, to be made *at the time* of making the contract, neither did the statute of this State, in force prior to the Revised Statutes. (1 R. L. 80, § 15.) The revisers, in their report to the legislature, provided that the

memorandum, the delivery and the payment should be made at the *time* the contract was made. But the legislature modified the provision as reported, and adopted it as we now find it in the statutes. The revisers deemed it important that the conditions prescribed to render the contract of sale valid, should be complied with at the time of making the contract. This was an alteration of the law as it had before, for more than a century, existed in this State and in England, and the attention of the legislature was thus distinctly called to it. It omitted the requirement as to *time*, so far as related to the memorandum and part delivery, but retained it as to the part payment. Effect must be given to this language. A contract for the sale of personal property for the price of fifty dollars or more is declared void unless one of three things be done, the last of which is payment by the buyer, *at the time*, of part of the purchase-money. Payment afterward will not do. The payment must be made when the contract is made. Such is the plain language of the statute. Here there was but one contract made, which was in September. There was no attempt to make any other. There was no talk about any, and so far as appears no renewal, reaffirmation or restatement in any form of that one. All that took place afterward was a payment of $300 toward the hops. If this could be called a payment at the time of making the contract, within the meaning of the statute, then this provision of the statute serves no purpose, as every payment subsequently made, to apply upon the contract, would render it binding within the statute, and the provision requiring payment at the time would be nullified. A payment not made at the time can never, under any circumstances, satisfy the requirement of the statute. But when a contract for the sale of personal property, valid at common law, is made, and the buyer afterward pays expressly to bind the contract, or when payment is made the parties then reaffirm or restate the terms of the contract, and their minds then meet so as to make a contract, the statute is undoubtedly satisfied. Such a payment is made at the time of the contract and not afterward.

This particular provision of the statute has not received much attention in the courts. It seems first to have been under consideration in Massachusetts, in *Thompson* v. *Alger*, 12 Metcalf, 428, a case growing out of the sale of railroad stock, made in this State. In that case, Dewey, J., expresses the opinion that

a payment made subsequently to the time of making the contract, with the concurrence of both parties, will answer the requirement of the statute and that the contract becomes valid from the time of such payment; but the decision of the case was put upon the ground, that what took place when the payment was made was sufficient to show that the minds of the parties then met and an agreement was then made. In *Sprague* v. *Blake*, 20 Wend. 61, it was held that a subsequent delivery and acceptance of property, sold under a contract otherwise void under the statute of frauds, rendered the contract valid. Judge Cowen writing the opinion says: "The statute does not require that the part acceptance should be at the time of the oral contract, though it seems to be otherwise of earnest-money which is to bind the bargain." In *McKnight* v. *Dunlop*, 5 N. Y. 537, the same provision of the statute was under consideration, and a similar decision as to the effect of subsequent delivery and acceptance was made. Judge Paige writing the opinion, refers to the case of *Thompson* v. *Alger*, and citing the doctrine of Dewey, J., as to the effect of subsequent payment says: "If the contract is not, in law, deemed to be made until the part payment of the purchase-money, and the previous invalid oral agreement is merely referred to, to ascertain the terms of the subsequent valid contract, the decision of the Supreme Judicial Court of Massachusetts may be regarded as sound." In *Bissell* v. *Balcom*, 39 N. Y. 274. some of the language used by Judge Woodruff goes far to sustain the claim of the plaintiff in this case. That was an action to recover the price of certain cattle sold by defendant to the plaintiff. At the time of the sale, the cattle were left in the possession of the plaintiff, and nothing was done to make the contract binding within the statute of frauds. On the next day, the plaintiff called upon the defendants for part payment to bind the bargain, and the defendant paid him three dollars for that purpose. It was held that the payment was sufficient for the statute. The parties came together speaking of and referring to the contract which they recognized as incomplete and invalid, and for the express purpose of a compliance with the statute the purchaser, at the request of the seller, made the payment. The contract was, intentionally, then made, and, hence, it could with propriety be held that the payment was made at the time of making the contract. In *Allis* v. *Read*, 45 N. Y. 142, the plaintiff agreed verbally with the de-

fendants for the purchase of a quantity of cloths, no portion of the purchase-money being then paid or goods delivered; but, subsequently, when, by the first arrangment a payment became due, the parties again met and, upon further negotiations and agreements varying somewhat the original void contract, the plaintiff delivered to the defendants one T.'s promissory note, which was to be collected and applied by them on the purchase-price of the cloths; and he also conveyed to them certain other merchandise, which they were to sell and also apply the avails, after deducting their commissions, to the purchase-price of the cloths; and it was held that the minds of the parties must be deemed to have then met upon all the terms and conditions of the agreement for the sale of the cloths, and that it then became, by the plaintiff's transfer of the note and consignment of merchandise, a valid and binding contract under the statute. Church, Ch. J., writing the opinion of the court says: "It is unnecessary to determine that every void contract may be made valid by a payment, subsequent to the time of making it, but, I do not hesitate to say that after a void contract has been made, the parties may make a valid contract by adopting the terms of the void contract, provided, it appears that such terms are understood and assented to and a payment is made and received upon the contract. It is a valid contract from that time, and the statute is fully satisfied as if the contract had been made valid originally, by a payment at that time;" and, he says that he sees no objection to adopting the views of Judge Dewey in *Thompson* v. *Alger*, as to the effect of a subsequent payment, with the qualification that it should appear that the parties understood and assented to the terms of the contract, at the time of the payment. Some of the views expressed by Judge Potter in *Webster* v. *Zielly*, 52 Barb. 482, tend to sustain the claim of the plaintiff in this case, but they were unnecessary to the decision of that case as there was a sufficient note or memorandum of the agreement to satisfy the statute. The reasoning of the learned judge upon the question now under consideration is not satisfactory.

I have thus called attention to all the cases which have come to my notice, wherein the question now before us has been considered, and it will be seen that it has not been authoritatively decided. The following points may, however, be regarded as established: (1) Where a contract of sale has been made good

at common law, but void under the statute of frauds, and the parties subsequently meet, and for the express purpose of then complying with the statute and making the contract valid, a payment is made by the purchaser upon the contract, at the request of the seller, such payment is made at the time of making the contract, within the meaning of the statute. It cannot be claimed that there was such a payment in this case. (2) Where, in case of such a void contract, the parties subsequently come together, and substantially restate, reaffirm or renew its terms, so as then and there, by the meeting of their minds, to make a contract, and then payment is made upon the contract, the statute is complied with. Such was not this case. Here, when the payment was made, it does not even appear that the contract was mentioned. The money was paid toward the hops. The purchaser was not then bound and may not have intended to bind himself. He may have intended to leave the contract where the law actually does leave it, not enforceable against him. If such a payment answers the requirement of the statute, then it is impossible for any purchaser to make a subsequent payment toward goods purchased or upon a prior contract of purchase, which shall not be a compliance with the statute; and, thus, the words "at the time," in this clause of the statute can have no meaning or effect.

I am, therefore, of opinion, that the plaintiff should have been nonsuited, and the judgment must be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

HUNTER ET AL. v. WETSELL ET AL.

(84 New York, 549.—1881.)

FINCH, J. We are to assume as facts in this case, from the verdict of the jury, that an absolute contract for the sale of the hops, after they were weighed and baled, was entered into verbally by the parties, by the terms of which the hops were to be delivered where the defendants determined and requested, and were to be paid for within a few weeks upon such delivery,

at the rate of fifty cents per pound with $10.00 additional on the whole lot. Since the quantity of the hops, as baled and weighed, carried the price beyond $50.00, we held upon a previous appeal that the contract was void within the statute of frauds, because no memorandum in writing was made, no part of the property delivered, and no portion of the purchase-money paid at the time of the transaction. The after payments of $300 we decided to be insufficient to validate the contract, because when made there was no restatement or recognition of the essential terms of the contract. (57 N. Y. 375.) In the case as now presented the difficulty, fatal before, is claimed to have been obviated. There is proof of a restatement of the essential terms of the contract at the time of the delivery of the check for $200. There is proof also contradicting such alleged fact. The question was left to the jury, under a charge from the court which does not seem to be the subject of complaint, and they, in rendering a verdict for the plaintiffs, necessarily found the fact of such restatement. That finding is conclusive upon us.

But it is now objected that, conceding the fact of such restatement, there was no payment of any part of the purchase-money at that time. It is admitted that the check was then given, and it cannot be successfully denied that it was both delivered and received as a payment upon the contract price of the hops, but it is claimed that the check was not, in and of itself, payment, and having been drawn upon a bank, could not have been in fact paid until afterward, and so there was no payment "at the time" to satisfy the requirements of the statute. It is quite true that a check, in and of itself, is not payment, but it may become so when accepted as such and in due course actually paid. While not money, it is a thing of value, and is money's worth when drawn against an existing deposit which remains until the check is presented. We must assume that the check of the vendee, in this case, was good when drawn and was duly paid upon presentation in the usual and regular way, for it appears in the possession of the drawers, and they practically assert the fact of its payment by their counter-claim in the action, by which they seek to recover back the money so paid. There was, therefore, an actual and real payment made by the vendees to the vendor, upon the purchase-price of the hops. It is said, however, that the actual payment

of the money, as distinguished from the delivery of the check, was not "at the time" of the contract, but at some later period. We do not know accurately when the check was paid. It may have been the same day. It may have been within a very few moments. It may not have been till the next day. We are not to presume, for the purpose of making the contract invalid, that it was held beyond the natural and ordinary time. In such event it is a very narrow construction to say that the payment was not made at the time of the contract. The purpose and object of the statute should not be forgotten. Its aim is to substitute some act for mere words, to compel the verbal contract to be accompanied by some fact not likely to be mistaken, and so avoid the dangers of treacherous memory or downright perjury. The delivery of the check was such an act. Indeed, it would be an entirely reasonable and just construction to say that the delivery of the check and its presentment and payment constituted one continuous transaction, and should be taken as such without reference to the ordinary delay attendant upon turning the check into money. The statute does not mean rigorously, *eo instanti*. It does contemplate that the contract and the payment shall be at the same time, in the sense that they constitute parts of one and the same continuous transaction. We think, therefore, there was a payment "at the time," within the meaning of the statute, and that the contract of sale was valid. (*Artcher* v. *Zeh*, 5 Hill, 200; *Hawley* v. *Keeler*, 53 N. Y. 114; *Bissell* v. *Balcom*, 39 id. 275.)

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JACKSON ET AL. v. TUPPER ET AL.

(101 New York, 515.—1886.)

ACTION to recover damages for an alleged breach of warranty in a contract of sale.

On February 28, 1880, defendants orally sold about 800 tons of ice to plaintiffs, at the agreed price of 80 cents per ton. Defendants agreed to place the ice in a substantial house, warranted to stand for a year. The ice was subsequently received

and accepted by plaintiffs in said house. On May 1, 1880, plaintiffs gave defendants $615 in full for said ice, and such amount was credited on an account which Wight had against Tupper, but no mention was made of the contract of sale. About May 10, 1880, the ice-house fell in ruins. Defects therein were latent, and could not have been discovered by a previous inspection of the building.

ANDREWS, J. It is conceded that the oral contract of February 28, 1880, for the sale and storage of the ice was when made, void under the statute of frauds. It must also be conceded under the decisions in this State, that it was not validated by the payment made in May, 1880. By our statute, payment operates to take an oral contract for the sale of goods for the price of $50.00 or more out of the statute, only when it is made at the time of the contract. (2 R. S. 136, § 3.) The decisions have construed this provision of the statute with great strictness. (*Hunter* v. *Wetsell*, 57 N. Y. 375; *S. C.* 84 id. 549; *Allis* v. *Read*, 45 id. 142.) It is in substance held that payment subsequently made, although conforming to the oral agreement, is insufficient of itself to make the prior oral agreement valid. There must be enough in addition to the act of payment to show, that the terms of the prior oral contract were then in the minds of the parties, and were reaffirmed by them, and this being shown, a cause of action arises, not on the prior oral contract but on the new contract made at the time of the payment. The plaintiffs did not bring their case within this principle. There was no restatement of the terms of the prior oral agreement when the payment of May 1, 1880, was made, and no express recognition thereof, nor was the payment made for the avowed purpose of binding the prior bargain. It is expressly found that nothing was said at the time by either party about the contract of February 28, 1880, or its terms. But a prior void contract may be validated by a subsequent receipt and acceptance by the buyer, pursuant thereto, of the goods, or part of them, which are the subject of the contract. (2 R. S. 136, § 3; *McKnight* v. *Dunlop*, 5 N. Y. 537.) Where this has been done the cause of action arises on the original agreement authenticated by the act of acceptance. There is no statute difficulty, as in the case of a subsequent payment, because the statute does not, as in that case, require that the acceptance

must be at the time of the making of the oral agreement. It was found in this case that after the oral agreement of February 28, 1880, was made, "the said ice was received and accepted by the plaintiffs." It is impossible to construe the finding, except as referring to the ice which was the subject of the oral agreement of that date, and as referring to an acceptance thereunder. This relieved the contract from the ban of the statute. No question is presented as to the right of the plaintiffs to the judgment recovered, assuming that the contract of February 28, 1880, was validated.

The judgment should be affirmed.

All concur.

Judgment affirmed.

PART III.

THE TRANSFER OF TITLE.

HATCH v. OIL COMPANY.[1]

(100 United States, 124.—1879.)

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Contracts for the purchase and sale of chattels, if complete and unconditional and not within the Statute of Frauds, are sufficient, as between the parties, to vest the property in the pur-

[1] EXECUTORY AND EXECUTED CONTRACTS OF SALE.—"The distinction between the two contracts consists in this, that, in a bargain and sale, the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded, and without regard to the fact whether the goods be delivered to the buyer or remain in possession of the vendor; whereas, in the executory agreement, the goods remain the property of the vendor till the contract is executed. . . .

"Both these contracts being equally legal and valid, it is obvious that, whenever a dispute arises as to the true character of an agreement, the question is one rather of fact than of law. The agreement is just what the parties intended to make it. If that intention is clearly and unequivocally manifested, *cadit quæstio.* But parties very frequently fail to express their intentions, or they manifest them so imperfectly as to leave it doubtful what they really mean, and when this is the case the courts have applied certain rules of construction which in most instances furnish conclusive tests for determining the controversy.

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"When there has been no manifestation of intention, the presumption of law is that the contract is an actual sale, if the specific thing is agreed on, and it is ready for immediate delivery; but that the contract is only executory when the goods have not been specified, or if, when specified, something remains to be done to them by the vendor, either to put them into a deliverable shape, or to ascertain the price. . . . Of course these presumptions yield to proof of a contrary intent, and it must be repeated that nothing prevents the parties from agreeing that the property in a specific thing sold and ready for delivery is not to pass till certain conditions are accomplished, or that the property shall pass in a thing which remains in the vendor's possession and is not ready for delivery, as an unfinished ship; or which has not yet been weighed or measured, as a cargo of corn in bulk, sold at a certain price per pound or per bushel." Benjamin on Sales, §§ 308–311.

chaser, even without delivery; the rule being that such a contract constitutes a sale of the thing, and that its effect is, if not prejudicial to creditors, to transfer the property to the purchaser against every person not holding the same under a *bona fide* title for a valuable consideration without notice. *The Sarah Ann*, 2 Sumn. 211; *Gibson* v. *Stevens*, 8 How. 384, 399; 2 Kent, Com. (12th. ed.) 493; *Leonard* v. *Davis*, 1 Black, 476–483.

Nine hundred and forty-four thousand white-oak barrel-staves, of the value of $17,500, were attached by the defendant [Alonzo S. Hatch] as sheriff of the county, under certain processes mesne and final, which he held for service against the manufacturers of the staves, to secure certain debts which they owed to their creditors. No irregularity in the proceedings is suggested, but the plaintiffs claimed to be the owners of the staves by purchase from the manufacturers, and they brought replevin to recover the property. Service was made, and the defendant appeared and demanded a trial of the matter set forth in the declaration. Issue having been joined between the parties, they went to trial, and the verdict and judgment were in favor of the plaintiffs. Exceptions were filed by the defendant, and he sued out the present writ of error.

Errors assigned in the court are as follows: 1. That the court erred in instructing the jury that as soon as the staves were piled and counted, as provided in the second agreement, the title to the same vested in the plaintiff company as vendee, and in refusing to instruct the jury that the only interest the plaintiffs acquired in the staves before they were delivered was as security for advances in the nature of a mortgage interest. 2. That the court erred in refusing to instruct the jury that if there was no actual delivery of the property and change of possession the agreement of sale was void as against the creditors of the manufacturers, because not recorded as required by statute. 3. That the court erred in refusing to instruct the jury that if the evidence did not show that the fifty thousand staves not piled on the leased land were not counted, the title to that parcel did not pass to the plaintiffs for any purpose, and that the defendant, as to that parcel, was entitled to their verdict. 4. That the court erred in refusing to instruct the jury that under the agreement no title to any of the staves passed to the plaintiffs until they were actually placed upon the leased land

and were counted by the designated person, and in instructing the jury that the title to the staves piled near the leased land passed to the plaintiffs. 5. That the court erred in refusing to instruct the jury that no title to any staves passed to the plaintiffs other than those contracted to be sold by the first agreement, and that if the jury find that there was any portion of the staves replevied not of that description, that as to such portion the plaintiffs are not entitled to recover. 6. That the court erred in excluding the testimony offered by the defendant, as set forth in the record.

Sufficient appears to show that the manufacturers of the staves, on the day alleged, contracted with the plaintiffs to sell them one million of white-oak barrel-staves of certain described dimensions, to be delivered as therein provided, for the price of $30.00 per thousand, subject to count and inspection by the plaintiffs, who agreed to receive and pay for the same as fast as inspected. But before the staves had been furnished, to wit, on the 28th of August in the same year, the parties entered into a new agreement in regard to the staves, in which they refer to the prior one, and stipulate that it is to continue in operation, subject to modifications made in the new contract, of which the following are very material to the present investigation: 1. That the manufacturers shall make and deliver the staves properly piled in some convenient place, to be agreed between the parties, on land in Deerfield, to be controlled by the plaintiffs, and that the delivery shall be made as fast as the staves are sawed. 2. That the plaintiff shall furnish a man to count the staves from week to week as the same shall be piled. 3. That when the staves shall be so piled and counted, the person counting the same shall give the manufacturers a certificate of the amount, which, when presented to the plaintiffs, shall entitle the party to a payment of $17.00 per thousand as part of the purchase price. 4. That upon the piling and counting of the staves as provided, "the delivery of the same shall be deemed complete, and that said staves shall then become and thenceforth be the property of the plaintiffs absolutely and unconditionally."

Other material modifications of the first agreement were made by the second, some of which it is not deemed necessary to consider in disposing of the case.

Early measures were adopted to perfect the arrangement, as

appears from the fact that the manufacturers, October 4 in the same year, leased to the plaintiffs a small tract of land to be used for piling and storing the staves; and the case shows that all the staves except fifty thousand were piled on that site, the fifty thousand staves being piled on land owned by the manufacturers, about one hundred or one hundred and fifty feet distant from the pile on the leased tract, on which were certain buildings owned and occupied by the lessors, the mill where the staves were manufactured being situated on the same section a little distant from the other buildings. None of the staves were manufactured when the contracts were made.

It was admitted by the plaintiffs that the lease was never filed in the clerk's office and that it was never recorded in the office of the county register of deeds. Certain admissions were also made by the defendant, as follows: That the parties to the contracts acted in good faith in making the same, and that the contracts and lease were duly executed; that all the staves seized were manufactured by the said contractors, and that all except fifty thousand of the same were piled on the leased tract.

Nothing was required at common law to give validity to a sale of personal property except the mutual assent of the parties to the contract. As soon as it was shown by competent evidence that it was agreed by mutual assent that the one should transfer the absolute property in the thing to the other for a money price, the contract was considered as completely proven and binding on both parties. If the property by the terms of the agreement passed immediately to the buyer, the contract was deemed a bargain and sale; but if the property in the thing sold was to remain for a time in the seller, and only to pass to the buyer at a future time or on certain conditions inconsistent with its immediate transfer, the contract was deemed an executory agreement. Contracts of the kind are made in both forms, and both are equally legal and valid; but the rights which the parties acquire under the one are very different from those secured under the other. Ambiguity or incompleteness of language in the one or the other frequently leads to litigation; but it is ordinarily correct to say, that whenever a controversy arises in such a case as to the true character of the agreement, the question is rather one of intention than of strict law, the general rule being that the agreement is just what the parties intended to make it, if the intent can be col-

lected from the language employed, the subject-matter, and the attendant circumstances.

Where the specific goods to which the contract is to attach are not specified, the ordinary conclusion is that the parties only contemplated an executory agreement. Reported cases illustrate and confirm that proposition, and many show that where the goods to be transferred are clearly specified and the terms of sale, including the price, are explicitly given, the property, as between the parties, passes to the buyer even without actual payment or delivery. 2 Kent, Com. (12th ed.) 492; *Tome* v. *Dubois*, 6 Wall. 548, 554; *Carpenter* v. *Hale*, 8 Gray (Mass.), 157; *Martineau* v. *Kitching*, Law Rep. 7 Q. B. 436, 449; Story, Sales (4th ed.), sec. 300.

Standard authorities also show that where there is no manifestation of intention, except what arises from the terms of sale, the presumption is, if the thing to be sold is specified and it is ready for the immediate delivery, that the contract is an actual sale, unless there is something in the subject-matter or attendant circumstances to indicate a different intention. Well-founded doubt upon that subject cannot be entertained if the terms of bargain and sale, including the price, are explicit; but when the thing to be sold is not specified, or if when specified something remains to be done to the same by the vendor, either to put it into a deliverable state or to ascertain the price, the contract is only executory. In the former case there is no reason for imputing to the parties any intention to suspend the transfer, inasmuch as the thing to be sold and the price have been specified and agreed by mutual consent, and nothing remains to be done. Quite unlike that, something material remains to be done by the seller in the latter case before delivery, from which it may be presumed that the parties intended to make the transfer dependent upon the performance of the things yet to be done.

Suppose that is so, still every presumption of the kind must yield to proof of a contrary intent, and it may safely be affirmed that the parties may effectually agree that the property in the specific thing sold, if ready for delivery, shall pass to the buyer before such requirements are fulfilled, even though the thing remains in the possession of the seller.

Where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, Bailey, J., said the prop-

erty passes immediately, so as to cast upon the purchaser all future risk, if nothing remains to be done to the goods, although he cannot take them away without paying the price. *Simmons* v. *Swift*, 5 B. & C. 857.

Sales of goods not specified stand upon a different footing, the general rule being that no property in such goods passes until delivery, because until then the very goods sold are not ascertained. But where by the contract itself the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take the same and to pay the stipulated price, the parties, says Parke, J., are thus in the same situation as they would be after a delivery of goods under a general contract, for the reason that the very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession. *Dixon* v. *Yates*, 5 Barn. & Adol. 313, 340; Shep. Touch. 224.

When the agreement of sale is of a thing not specified, or for an article not manufactured, or of a certain quantity of goods in general without any identification of them or an appropriation of the same to the contract, or when something remains to be done to put the goods into a deliverable state, or to ascertain the price to be paid by the buyer, the contract is merely an executory agreement, unless it contains words warranting a different construction, or there be something in the subject-matter or the circumstances to indicate a different intention. Benjamin, Sales (2d ed.), 257; Blackburn, Sales, 151; *Young* v. *Matthews*, Law Rep. 2 C. P. 127–129; *Logan* v. *LeMesurier*, 6 Moore, P. C. C. 116; *Ogg* v. *Shuter*, Law. Rep. 10 C. P. 159–162; *Langton* v. *Higgins*, 4 H. & N. 400; *Turley* v. *Bates*, 2 H. & C. 200–208.

Exactly the same views are expressed by the Supreme Court of the State as those maintained in the preceding cases. Speaking to the same point, Cooley, C. J., says, when, under a contract for the purchase of personal property, something remains to be done to identify the property or to put it in a condition for delivery, or to determine the sum that shall be paid for it, the presumption is always very strong, that by the understanding of the parties the title is not to pass until such act has been fully accomplished. Such a presumption, however, is by no means conclusive; for if one bargains with another for the pur-

chase of such property, and the parties agree that what they do in respect to its transfer shall have the effect to vest the title in the buyer, he will become the owner, as the question is merely one of mutual assent, the rule being, that if the minds of the parties have met, and they have agreed that the title shall pass, nothing further, as between themselves, is required, unless the case is one within the Statute of Frauds. Consequently, it was held by the same court that if one purchases gold bullion by weight, and receives delivery before it becomes convenient to weigh it, and on the understanding that the weighing shall be done afterwards, the bullion would become the property of the buyer and be at his risk, unless there were some qualifying circumstances in the case. *Wilkinson* v. *Holiday*, 33 Mich. 386–388; *Lingham* v. *Eggleston*, 27 id. 324, 328; *Ortman* v. *Green*, 26 id. 209, 212.

Decisions of other states are to the same effect, of which the following are examples: *Pacific Iron Works* v. *Long Island Railroad Co.*, 62 N. Y. 272, 274; *Groffe* v. *Belche*, 62 Mo. 400–402; *Morse* v. *Sherman*, 106 Mass. 430, 433; *Riddle* v. *Varnum*, 20 Pick. (Mass.) 280, 283; *Chapman* v. *Shepard*, 39 Conn. 413–419; *Fuller* v. *Bean*, 34 N. H. 290–300.

Modern decisions of the most recent date support the proposition that a contract for the sale of specific ascertained goods vests the property immediately in the buyer, and that it gives to the seller a right to the price, unless it is shown that such was not the intention of the parties. *Gilmore* v. *Supple*, 11 Moore, P. C. C. 551; Benjamin, Sales (2d ed.), 280; *Dunlop* v. *Lambert*, 6 Cl. & Fin. 600; *Calcutta Co.* v. *De Mattos*, 32 Law J. Rep. N. S. Q. B. 322–338.

"There is no rule of law," says Blackburn, J., in the case last cited, "to prevent the parties in such cases from making whatever bargain they please. If they use words in the contract showing that they intend that the goods shall be shipped by the person who is to supply the same, on the terms that when shipped they shall be the consignee's property and at his risk, so that the vendor shall be paid for them whether delivered at the port of destination or not, this intention is effectual." *S. C.* 33 id. 214; 11 W. R. 1024, 1027.

Support in some of the cases cited is found to the theory that the terms of the bargain and sale in this case, inasmuch as they indicate that the intention of the sellers was to appropriate the

staves when manufactured to the contract, are sufficient to vest the property in the buyer when the agreed sum to be advanced was paid even without any delivery; but it is quite unnecessary to decide that question in view of the evidence and what follows in the second contract between the parties.

Provision was made that a convenient place should be designated by the parties where the staves should be piled as fast as they should be sawed. Such a place was provided to the acceptance of both parties, and the plaintiffs furnished a man as agreed to count the same from week to week as the staves were piled. Enough appears to show that all the staves, except as aforesaid, were piled and delivered at that agreed place.

In a contract of sale, if no place of delivery is specified in the contract, the articles sold must, in general, be delivered at the place where they are at the time of the sale, unless some other place is required by the nature of the article or by the usage of the trade or the previous course of dealing between the parties, or is to be inferred from the circumstances of the case. Decided cases to that effect are numerous; but the rule is universal, that if a place of delivery is prescribed as a part of the contract the vendee is not bound to accept a tender of the goods made in any other place, nor is the vendor obliged to make a tender elsewhere. Story, Sales (4th ed.), sec. 308.

Where by the terms of the contract, the article is to be delivered at a particular place, the seller, before he can recover his pay, is bound to prove the delivery at that place. *Savage Manuf. Co.* v. *Armstrong*, 19 Me. 147.

So when the intention of the parties as to the place of delivery can be collected from the contract, and the circumstances proved in relation to it, the delivery should be made at such place, even though some alterations have been made in the place designated. *Howard* v. *Miner*, 20 id. 325–330.

Much discussion is certainly unnecessary to show that, where the terms of bargain and sale are in the usual form, an absolute delivery of the article sold vests the title in the purchaser, as the authorities upon the subject to that effect are numerous, unanimous and decisive. *Hyde* v. *Lathrop*, 3 Keyes (N. Y.), 597; *Macomber* v. *Parker*, 13 Pick. (Mass.) 175, 183.

In an action for goods sold and delivered, if the plaintiff proves delivery at the place agreed and that there remained

nothing further for him to do, he need not show an acceptance by the defendant. *Nichols* v. *Morse*, 100 Mass. 523.

Even when a place of delivery is specified, it does not necessarily follow that the title does not pass before they reach the designated place, as that may depend upon the intention of the parties; and whether they did or did not intend that the title should vest before that is a question for the jury, to be determined by the words, acts, and conduct of the parties and all the circumstances. *Dyer* v. *Libbey*, 61 Me. 45.

Where it appears that there has been a complete delivery of the property in accordance with the terms of a sale, the title passes, although there remains something to be done in order to ascertain the total value of the goods at the rates specified in the contract. *Burrows* v. *Whitaker*, 71 N. Y. 291–296; *Graft* v. *Fitch*, 58 Ill. 373; *Russell* v. *Carrington*, 42 N. Y. 118, 125; *Terry* v. *Wheeler*, 25 id. 520, 525.

Beyond controversy, such must be the rule in this case, because the contract provides that upon the piling and counting the staves as required by the instrument the delivery of the same shall be deemed complete, and that the staves shall then become and henceforth be the property of the plaintiffs absolutely and unconditionally.

Except the fifty thousand before named, all the staves were so piled and counted; and the case shows that the person designated to count the same approved fourteen certificates specifying the respective amounts of the several parcels delivered, and that the plaintiffs paid on each the $17.00 per thousand advance as agreed, amounting in all to $15,148.

Personal property may be purchased in an unfinished condition, and the buyer may acquire the title to the same though the possession be retained by the vendor in order that he may fit it for delivery, if the intention of the parties to that effect is fully proved. *Elgee Cotton Cases*, 22 Wall. 180.

After an executory contract has been made, it may be converted into a complete bargain and sale by specifying the goods to which the contract is to attach, or, in legal phrase, by the appropriation of specific goods to the contract, as the sole element deficient in a perfect sale is thus supplied. Benjamin, Sales (2d. ed.), 263; *Rohde* v. *Thwaites*, 6 B. & C. 388.

Examples of the kind are numerous in cases where the goods are not specified, and the decided cases show that if the seller

subsequently selects the goods and the buyer adopts his acts, the contract which before was a mere agreement is converted into an actual sale and the property passes to the buyer. One hundred quarters of barley out of a bulk in a granary were agreed to be purchased by the plaintiff, he having agreed to send his own sacks, in which the same might be conveyed to an agreed place. He sent sacks enough to contain a certain part of the barley, which the seller filled, but, being on the eve of bankruptcy, he refused to deliver any part of the quantity sold, and emptied the barley in the sacks back into the bulk in the granary. Held, in an action brought to recover the whole amount, that the quantity placed in the sacks passed to the purchaser, as that part was appropriated by the bankrupt to the plaintiff. *Aldridge* v. *Johnson*, 7 E. & B. 885; *Browne* v. *Hare*, 3 H. & N. 484; *S. C.* 4 id. 821; *Treyeles* v. *Sewell*, 7 id. 573.

Stipulations in respect to the forwarding and shipping the staves are also contained in the second agreement; but it is not necessary to enter into any discussion of that topic, as it appears that the manufacturers, if they did anything in that regard, were to act as the agents of the plaintiffs, and if they failed to transport the same to the place of shipment seasonably, the plaintiffs were authorized to do it at their expense. Nor is it necessary to discuss the stipulations as to insurance, as it is clear that they contain nothing inconsistent with the theory that the property vested in the plaintiffs as soon as the staves were piled and delivered at the agreed place of delivery.

Proof of a satisfactory character was exhibited that much the greater portion of the staves were piled upon the leased site, and that the residue were piled on land adjoining, and within a hundred or a hundred and fifty feet from the larger pile. Witnesses examined the staves piled there several times, and one of them testified that he was there July 10, 1875, with one of the sellers, and made a thorough count of the staves, the number counted being 780,000, and he states that he counted the staves in both piles, and that there were no other white-oak staves on the premises.

Taken as a whole, the evidence shows that the parties treated both piles of the staves as delivered under the contract, the one as much as the other, and that they regarded both as properly included in the adjustment of the amounts to be advanced. When the agent of the plaintiffs went there, as before ex-

plained, with one of the sellers, it is certain that they counted both piles, and it is clear that in view of the evidence and the circumstances the jury were warranted in finding that the property in all the white-oak staves piled there passed to the plaintiffs when they were piled and delivered at that place, neither party having objected to the place where the smaller parcel was piled.

Actual delivery of the staves having been proved, it is not necessary to make any reply to the defense set up under the State statute in respect to the sale of goods unaccompanied by a change of possession. Objection is also made that the lease of the premises designated as the place of delivery was not recorded, which is so obviously without merit that it requires no consideration.

Viewed in the light of these suggestions, it is obvious that the first five assignments of error must be overruled.

Exception was also taken to the ruling of the court below in excluding certain testimony offered by the defendant to show that the staves were not cut and made at the time some of the certificates were given to secure the advance, and to show that the staves included in the small pile were never in fact counted, and that no certificate specially applicable to them was ever given. Responsive to the objection of the defendant, the court below remarked, that, if the staves were subsequently piled there to the satisfaction of the plaintiffs, the title passed, it appearing that the certificates were given and the advance paid, which is all that need be said upon the subject, as it is plain that the ruling is without just exception.

Judgment affirmed.

TARLING v. BAXTER.

(6 Barnewall & Cresswell, 360.—1827.)

ASSUMPSIT to recover back £ 145 paid by the plaintiff to the defendant's use. The declaration contained counts for money had and received, and the other common counts. Plea, general issue, with a notice of set-off for goods sold and delivered and bargained and sold. At the trial before Abbott, C. J.,

a verdict was found for the plaintiff for £ 145, subject to the opinion of this court on the following case:

On January 4, 1825, plaintiff bought of defendant a stack of hay belonging to the latter, and then standing in a field belonging to defendant's brother. The note signed by defendant, and delivered to plaintiff, was in these words: "I have this day agreed to sell James Tarling a stack of hay, standing in Canonbury Field, Islington, at the sum of one hundred and forty-five pounds, the same to be paid on the 4th day of February next, and to be allowed to stand on the premises until the first day of May next." Plaintiff then signed and delivered the following note to the defendant: "I have this day agreed to buy of Mr. John Baxter, a stack of hay, standing in Canonbury Field, Islington, at the sum of £ 145, the same to be paid on the 4th day of February next, and to be allowed to stand on the premises until the first day of May next, the same hay not to be cut until paid for. January 4, 1825." On the same occasion, defendant said to plaintiff, "You will particularly oblige me by giving me a bill for the amount of the hay." The plaintiff rather objected.

On January 8, 1825, defendant's brother took a bill of exchange for £ 145 to plaintiff, drawn upon him by defendant, dated January 4, 1825, payable one month after date, which plaintiff accepted. Defendant afterwards indorsed it to George Baxter, and plaintiff paid it to one Taylor, the holder, when it became due. The stack of hay remained on the same field entire until January 20, 1825, when it was consumed by fire, without fault or neglect of either party.

A few days after the fire, plaintiff applied to defendant to know what he meant to do when the bill became due; defendant said, "I have paid it away, and you must take it up, to be sure: I have nothing to do with it: why did you not remove the hay?" Plaintiff said, "he could not because there was a memorandum 'that it should not be removed until the bill was paid;' would you have suffered it to be removed?" and defendant said, "certainly not." Defendant's set-off was for the price of the hay agreed to be sold as aforesaid. The question for the opinion of the court was, whether the plaintiff, under the circumstances, was entitled to recover the sum of £145 or any part thereof.

BAYLEY, J. It is quite clear, that the loss must fall upon him in whom the property was vested at the time when it was destroyed by fire. And the question is, in whom the property in this hay was vested at that time? By the note of the contract delivered to the plaintiff, the defendant agreed to *sell* the plaintiff a stack of hay standing in Canonbury Field, at the sum of £ 145, the same to be paid for on the 4th of February next, and to be allowed to stand on the premises until the first day of May next. Now this was a contract for an immediate, not a prospective sale. Then the question is, in whom did the property vest by virtue of this contract? The right of property and the right of possession are distinct from each other; the right of possession may be in one person, the right of property in another. A vendor may have a qualified right to retain the goods unless payment is duly made, and yet the property in these goods may be in the vendee. The fact in this case, that the hay was not to be paid for until a future period, and that it was not to be cut until it was paid for, makes no difference, provided it was the intention of the parties that the vendee should, by the contract, immediately acquire a right of property in the goods, and the vendor a right of property in the price. The rule of law is, that where there is an immediate sale, and nothing remains to be done by the vendor as between him and the vendee, the property in the thing sold vests in the vendee, and then all the consequences resulting from the vesting of the property follow, one of which is, that if it be destroyed, the loss falls upon the vendee. The note of the buyer imports also an immediate, perfect, absolute agreement of sale. It seems to me that the true construction of the contract is, that the parties intended an immediate sale, and if that be so, the property vested in the vendee, and the loss must fall upon him. The rule for entering a nonsuit must therefore be made absolute.

Rule absolute.

(Opinions by HOLROYD and LITTLEDALE, JJ., omitted.)

TERRY v. WHEELER.

(25 New York, 520.—1862.)

ACTION by the assignee of one Lewis Elmore to recover the price paid for a quantity of lumber. The defendant sold the lumber to said Elmore at his yard in Troy, received payment therefor, and delivered to him the following bill of sale:

"TROY, N. Y., August 24, 1854.

"Mr. LEWIS ELMORE,

"Bought of E. B. WHEELER.

(Terms—Three months from date of sale.)

4,160 feet clear pine, $34.00	$141.44
4,779 " 4 " 24.00	114.69
7,319 " box " 20.00	146.38
½ inspection,	2.03
600 piece boards, 17 c.	102.00
	$506.54
Cr.	
By deduction for cash,	$ 5.00
Aug. 25. By cash,	250.00
Your note due Nov. 28,	251.54
	$506.54

"Rec'd payment as above,

"E. B. WHEELER,

"Per Wm. A. Craig.

"To be delivered to the cars free of charge.

"E. B. WHEELER.

"Craig."

The lumber was destroyed by fire within a few hours after the sale without fault of the defendant, and before the delivery of any part thereof at the railroad in Troy.

The court below held that, as the defendant had agreed to deliver the lumber at the cars in Troy, and had failed so to do, he was liable to the plaintiff.

SELDEN, J. There may be some doubt whether the parol

evidence in regard to the agreement to deliver the lumber was admissible, but if it were necessary to decide that question, I should regard it as admissible, on the ground that what is called the bill of sale was in substance a mere receipt for the purchase money, and did not purport to be a contract. (*Dunn* v. *Hewitt*, 2 Denio, 637; *Blood* v. *Harrington*, 8 Pick. 552; *Filkins* v. *Whyland*, 24 N. Y. 338.) If the lumber had not been paid for, and the instrument, omitting the receipt, had been signed by the defendant and delivered, as a note or memorandum of the sale, it would then have been the evidence of a contract, executory on one part at least, and not open to explanation by parol. But looking at the whole instrument, I think it is to be regarded as a receipt, and not a contract, within the cases above cited. Of course, in this view, the memorandum at the foot of the bill is not regarded as a part of it; if it were, its character would be changed from a receipt to an executory contract, conclusive upon the parties, except so far as it was still a receipt. (*Eggleston* v. *Knickerbocker*, 6 Barb. 458.)

The point which is made upon the contradictory character of the evidence in relation to the contract to deliver the lumber on the cars, and its sufficiency to establish such contract, presents only a question of fact which this court cannot review. Where the finding of a court or referee upon a question of fact is ambiguous, the evidence may be referred to for the purpose of removing the ambiguity, but not to reverse or modify a distinct finding, or to establish an independent fact not found. (19 N. Y. 210; 21 id. 550; 22 id. 324; 23 id. 344.) We can no more review the decision of the court, that the testimony was not conflicting, than we can the conclusion that it was sufficient; and we can do neither without making a precedent which would open to review here the details of the evidence in all cases.

But in the view which I take of the remaining question, it becomes immaterial whether there was a contract to deliver at the cars or not. The lumber had not been actually delivered, but remained in the possession of the vendor. In the absence of any express contract to deliver, there was an implied one to deliver at the yard of the vendor, when called for. In either case the lumber did not remain at the risk of the vendor, if the title did not remain in him. The risk attends upon the title, not upon the possession, where there is no special agreement upon the subject. (*Tarling* v. *Baxter*, 6 B. & C. 360; *Willis* v.

Willis, 6 Dana, 49; *Hinde* v. *Whitehouse*, 7 East, 558; *Joyce* v. *Adams*, 4 Seld. 296; 2 Kent's Com. 492, 496; Noy's Maxims, 88.) I entertain no doubt that upon the facts found in this case, the title was in the vendee. The lumber was selected by both parties and designated as the lumber sold to Elmore, except the 600 pieces, which were selected by the parties, and the precise pieces sold designated with as much precision as if the purchaser had marked every piece with his name; that which was sold by measurement was inspected and measured, and the quantity ascertained; the price for the whole was agreed upon and paid, and a bill of parcels receipted and delivered to the purchaser. These facts, I think, vested the title in the purchaser, notwithstanding the agreement of the seller to deliver the lumber free of charge, at the cars. "The sale of a specific chattel passes the property therein to the vendee, without delivery." (Chitty on Contr. 8 Am. ed. p. 332.) "It is a general rule of the common law that a mere contract for the sale of goods, where nothing remains to be done by the seller *before* making delivery, transfers the right of property, although the price has not been paid, nor the thing sold delivered to the purchaser." (*Olyphant* v. *Baker*, 5 Denio, 382.) The authorities are numerous, where the expression is used that if anything remains to be done by the seller, the title does not pass; but the cases which are referred to to sustain that position, only go the length of showing that where something is to be done by the seller to ascertain the identity, quantity or quality of the article sold, or to put it in the condition which the terms of the contract require, the title does not pass. (2 Kent's Com. 496; *Hanson* v. *Myer*, 6 East, 614; *Simmons* v. *Swift*, 5 B. & C. 857; *Joyce* v. *Adams*, 4 Seld. 291; *Field* v. *Moore*, Lalor's Sup. 418.) The list of cases to this effect might be indefinitely increased; but no case has been referred to by counsel, nor have I discovered any, in which, where the article sold was perfectly identified and paid for, it was held that a stipulation of the seller to deliver at a particular place prevented the title from passing. If the payment was to be made on or after delivery, at a particular place, it might fairly be inferred that the contract was executory, until such delivery; but where the sale appears to be absolute, the identity of the thing fixed, and the price for it paid, I see no room for an inference that the property remains the seller's, merely because he has engaged to transport it to a

given point. I think in such case the property passes at the time of the contract, and that in carrying it, the seller acts as bailee and not as owner. The questions which arise in such cases, as to sales, are questions of intention, such as arise in all other cases of the interpretation of contracts; and when the facts are ascertained, either by the written agreement of the parties or by the findings of a court, as they are here, they are questions of law. That the parties to the contract in this case intended to pass the title to the lumber immediately, appears very clear; nor do I suppose that any one would question it, were it not for the apparent hardship of the case to the purchaser. If the property, instead of being lumber, had been sheep or cows, capable of increase, (which follows the ownership,) and there had been a sudden and large increase to the flock, or drove, before they could be delivered at the point agreed upon, I think no one would have said that the defendant could have discharged his obligation to deliver, and yet retained the increase. Such, however, must be the conclusion, if the plaintiff's position is maintained. The judgment should be reversed and a new trial granted.

All the judges concurring,

Judgment reversed, and new trial ordered.

CROFOOT v. BENNETT.

(2 New York, 258.—1849.)

ON September 2, 1846, Horace Crofoot, a brother of the plaintiff in this action, in consideration of a previous indebtedness to and a new advance by the defendant, transferred to him by writing all the brick in two kilns previously burnt in Crofoot's yard, supposed to be 45,000, and 43,000 to be taken out of a new kiln which he was then putting up. It was stated in the writing that the defendant had paid for the brick, and that they were to be good merchantable brick. On the next day the defendant went to the yard for the purpose of having all the brick delivered to him, and on that occasion the brick already burnt, as well as those unburnt, were pointed out to the defendants by Horace Crofoot, and the defendant took possession of the prem-

ises where the brick were and gave directions about them; *but none of those in the unburnt kiln were counted out or marked, or set apart from the residue.* Horace Crofoot agreed with the defendant to burn the unfinished kiln, which he accordingly did. On the 6th of October following Horace Crofoot executed to the plaintiff a bill of sale of *all the bricks* in such new kiln. On the 8th of the same month the defendant opened the kiln and took therefrom and carried away the quantity which had been purchased by him out of that kiln, and for that taking the plaintiff brought this action.

STRONG, J. It is said in the opinion of the supreme court, that the title to the unburnt brick passed to the defendant on the 3d of September, before they had been separated from the mass in the new kiln, or burnt. In this I think they were wrong. Chancellor Kent says that when the goods sold are mingled with others, they must be ascertained, designated and separated from the mass, before the property can pass. It is a fundamental principle pervading everywhere the doctrine of sales of chattels, that if goods be sold while mingled with others, by number, weight or measure, the sale is incomplete, and the title continues with the seller, until the bargained property be separated and identified. (2 Kent's Com. 496.) These rules are fully supported by the authorities cited by the chancellor. The reason is, that the sale cannot apply to any article until it is clearly designated, and its identity thus ascertained. In the case under consideration, it could not be said with certainty that any particular brick belonged to the defendant until they had been separated from the mass. If some of those in an unfinished state had been spoiled in the burning, or had been stolen, they could not have been considered as the property of the defendant, and the loss would not have fallen upon him. But if the goods sold are clearly identified, then, although it may be necessary to number, weigh or measure them, in order to ascertain what would be the price of the whole at a rate agreed upon between the parties, the title will pass. If a flock of sheep is sold at so much the head, and it is agreed that they shall be counted after the sale in order to determine the entire price of the whole, the sale is valid and complete. But if a given number out of the whole are sold, no title is acquired by the purchaser until they are separated, and their identity thus ascertained and deter-

mined. The distinction in all these cases does not depend so much upon what is to be done, as upon the object which is to be effected by it. If that is specification, the property is not changed; if it is merely to ascertain the total value at designated rates, the change of title is effected. In this case, the judge who tried the cause did not decide directly that the defendant had acquired a title to the bricks which he took before they had been separated. The question was, however, distinctly raised by the plaintiff's counsel, and was in effect decided against him. Although the judge erred in that, the judgment will not therefore be reversed if in legal intendment the error could not in any manner have prejudiced the plaintiff. It could not have had that effect if the plaintiff must still have failed in the suit had the point been decided in his favor.

If the counsel for the plaintiff had insisted that the question of delivery of the brick should have been submitted to the jury as one of fact, there was enough in the evidence to have called upon the judge to adopt that course; but this position was not taken by the counsel: on the contrary, he called upon the judge to decide it as a question of law, upon facts which were not controverted, and, assuming those facts to be true, the judge decided that point correctly. The delivery was not simply of the specific bricks eventually taken by the plaintiff, but of the whole with the privilege of selection. The formal delivery of the yard must have been designed by the parties to carry with it the possession of the bricks, or it would have been a mere idle ceremony. The defendant then took possession of the whole, and gave directions about burning those which were yet in an unfinished state. It made no difference that such directions were given to one who had an interest in a portion of them, and had previously owned the whole. If one sells an article, and delivers it, the delivery would be none the less effectual because the vendor happened to be employed to perform some additional work upon it, even at his own expense. And surely, goods may be delivered by one to another having an interest in them, although the prior possessor may not part with all his title to the whole. Under these circumstances, trespass would not lie at the suit of the vendor, or his subsequent vendee. The goods being in the possession of another, the vendee took his title with an implied, if not a positive, notice of the rights of the possessor, to which the interest acquired by him was subordinate. In

order to maintain trespass, it is necessary that the plaintiff should have the actual possession of the property, or, an absolute title to it, which gives the right of possession. In this case, while the actual possession was in the defendant, it does not appear that any possession whatever had been delivered to the plaintiff; neither had he the absolute property in any of the brick until the defendant had exercised his right of selection. The defendant had, therefore, made out a full defense to the plaintiff's action, as was correctly decided by the judge; and although he may have placed the decision on different, and possibly insufficient grounds, yet, as the judgment was right, it should not be disturbed.

JEWETT, C. J., and BRONSON, J., dissented.

Judgment affirmed.

KIMBERLY ET AL. v. PATCHIN.

(19 New York, 330.—1859.)

CONVERSION to recover the value of 6,000 bushels of wheat. **Judgment** for plaintiffs; defendant appeals.

COMSTOCK, J. Both parties trace their title to the wheat in controversy to D. O. Dickinson, who was the former owner, and held it in store at Littlefort, Wisconsin. The defendant claims through a sale made by Dickinson to one Shuttleworth on the 18th of February, 1848. If that sale was effectual to pass the title, it is not now pretended that there is any ground on which the plaintiffs can recover in this suit. The sale to the person under whom they claim, was about two and a half months junior in point of time.

The sale to Shuttleworth was by a writing in the form of a present transfer of six thousand bushels of wheat, at seventy cents per bushel. No manual delivery was then made, but instead thereof the vendor executed and delivered to the vendee another instrument, declaring that he had received in store the six thousand bushels subject to the vendee's order; of the price $2,600 was paid down, and the residue $1,600 which was to be

paid at a future day, the purchaser afterwards offered to pay, according to the agreement. So far the contract had all the requisites of a perfect sale. The sum to be paid by the purchaser was ascertained, because the number of bushels and the price per bushel were specified in the contract. Although the article was not delivered into the actual possession of the purchaser, yet the seller, by the plain terms of his agreement, constituted himself the bailee, and henceforth stood in that relation to the purchaser and to the property. That was equal in its results to the most formal delivery, and no argument is required to show that the title was completely divested, unless a difficulty exists yet to be considered.

The quantity of wheat in store to which the contract related, was estimated by the parties at about six thousand bushels. But subsequently, after Dickinson made another sale of the same wheat to the party under whom the plaintiffs claim, it appeared on measurement that the number of bushels was six thousand two hundred and forty-nine, being an excess of two hundred and forty-nine bushels. When Shuttleworth bought the six thousand bushels, that quantity was mixed in the storehouse with the excess, and no measurement or separation was made. The sale was not in bulk, but precisely of the six thousand bushels. On this ground it is claimed, on the part of the plaintiffs, that in legal effect the contract was executory, in other words a mere agreement to sell and deliver the specified quantity, so that no title passed by the transaction. It is not denied, however, nor does it admit of denial, that the parties intended a transfer of the title. The argument is, and it is the only one which is even plausible, that the law overrules that intention, although expressed in plain written language, entirely appropriate to the purpose.

It is a rule asserted in many legal authorities, but which may be quite as fitly called a rule of reason and logic as of law, that in order to an executed sale, so as to transfer a title from one party to another, the thing sold must be ascertained. This is a self-evident truth, when applied to those subjects of property which are distinguishable by their physical attributes from all other things, and, therefore, are capable of exact identification. No person can be said to own a horse or a picture, unless he is able to identify the chattel or specify what horse or what picture it is that belongs to him. It is not only legally, but logically,

impossible to hold property in such things, unless they are ascertained and distinguished from all other things; and this I apprehend is the foundation of the rule that, on a sale of chattels, in order to pass the title, the articles must, if not delivered, be designated, so that possession can be taken by the purchaser without any further act on the part of the seller.

But property can be acquired and held in many things which are incapable of such an identification. Articles of this nature are sold, not by a description which refers to and distinguishes the particular thing, but in quantities, which are ascertained by weight, measure or count; the constituent parts which make up the mass being undistinguishable from each other by any physical difference in size, shape, texture or quality. Of this nature are wine, oil, wheat and the other cereal grains, and the flour manufactured from them. These can be identified only in masses or quantities, and in that mode, therefore, they are viewed in the contracts and dealings of men. In respect to such things, the rule above mentioned must be applied according to the nature of the subject. In an executed and perfect sale the things sold, it is true, must be ascertained. But as it is not possible in reason and philosophy to identify each constituent particle composing a quantity, so the law does not require such an identification. Where the quantity and the general mass from which it is to be taken are specified, the subject of the contract is thus ascertained, and it becomes a possible result for the title to pass, if the sale is complete in all its other circumstances. An actual delivery indeed cannot be made unless the whole is transferred to the possession of the purchaser, or unless the particular quantity sold is separated from the residue. But actual delivery is not indispensable in any case in order to pass a title, if the thing to be delivered is ascertained, if the price is paid or a credit given, and if nothing further remains to be done in regard to it.

It appears to me that a very simple and elementary inquiry lies at the foundation of the present case. A quantity of wheat being in store, is it possible in reason and in law for one man to own a given portion of it and for another man to own the residue without a separation of the parts? To bring the inquiry to the facts of the case: in the storehouse of Dickinson there was a quantity not precisely known. In any conceivable circumstances could Shuttleworth become owner of six thou-

sand bushels, and Dickinson of the residue, which turned out to be two hundred and forty-nine bushels, without the portion of either being divided from the other? The answer to this inquiry is plain. Suppose a third person, being the prior owner of the whole, had given to S. a bill of sale of six thousand bushels, and then one to D. for the residue more or less, intending to pass to each the title, and expressing that intention in plain words, what would have been the result? The former owner most certainly would have parted with all his title. If, then, the two purchasers did not acquire it no one could own the wheat, and the title would be lost. This would be an absurdity. But if the parties thus purchasing could and would be the owners, how would they hold it? Plainly according to their contracts. One would be entitled to six thousand bushels, and the other to what remained after that quantity was subtracted.

Again suppose, Dickinson having in store and owning two hundred and forty-nine bushels, Shuttleworth had deposited with him six thousand bushels for storage merely, both parties agreeing that the quantities might be mixed. This would be a case of confusion of property, where neither would lose his title. In the law of bailments it is entirely settled that S., being the bailor of the six thousand bushels, would lose nothing by the mixture, and, it being done by consent, it is also clear that the bailee would lose nothing. (Story on Bailments, § 40; 2 Bl. Com. 405.)

These and other illustrations which might be suggested, demonstrate the possibility of a divided ownership in the six thousand two hundred and forty-nine bushels of wheat. If, then, the law admits that the property, while in mass, could exist under that condition, it was plainly competent for the parties to the sale in question, so to deal with each other as to effectuate that result. One of them being the owner of the whole, he could stipulate and agree, that the other should thenceforth own six thousand bushels without a separation from the residue. And this, I think, is precisely what was done. The six thousand bushels might have been measured and delivered to the purchaser, and then the same wheat might have been redelivered to the seller under a contract of bailment. In that case the seller would have given his storehouse receipt in the very terms of the one which he actually gave; and he might,

moreover, have mixed the wheat thus redelivered with his own, thereby reducing the quantity sold and the quantity unsold again to one common mass. Now the contract of sale and of bailment, both made at the same time, produced this very result. The formalities of measurement and delivery pursuant to the sale, and of redelivery according to the bailment — resulting in the same mixture as before — most assuredly were not necessary in order to pass the title, because these formalities would leave the property in the very same condition under which it was in fact left; that is to say, in the actual custody of the vendor, and blended together in a common mass. Those formal and ceremonial acts were dispensed with by the contract of the parties. They went directly to the result without the performance of any useless ceremonies, and it would be strange, indeed, if the law denied their power to do so.

There are in the books a considerable number of cases having a real or some apparent bearing upon the question under consideration. Some of them very unequivocally support the defendant's title under the sale to Shuttleworth. A few only of these cases will be cited. In *Whitehouse* v. *Frost*, 12 East, 614, the vendors owned forty tons of oil secured in one cistern, and they sold ten tons out of the forty, but the quantity sold was not measured or delivered. The purchaser sold the same ten tons to another person, and gave a written order on the original vendors, which, on being presented, they accepted, by writing the word "accepted" on the face of the order, and signing their names. It was held by the English Common Pleas that the title passed; considerable stress being laid on the acceptance of the order, which, it was said, placed the vendors in the relation of bailees to the quantity sold. This was in 1810. In the following year the case of *Jackson* v. *Anderson*, 4 Taunt. 24, was decided in the King's Bench. That was an action of trover for one thousand nine hundred and sixty pieces of coin called Spanish dollars. Mr. Fielding, at Buenos Ayres remitted to Laycock & Co., at London, $4,700, and advised the plaintiffs that one thousand nine hundred and sixty of the number were designed for them in payment for goods bought of them. Laycock & Co. received the four thousand seven hundred pieces and pledged the whole of them to the defendant, who sold them to the Bank of England. It was held: 1. That the letter of advice was a sufficient appropriation of $1,960 to

the plaintiffs. 2. That the plaintiffs and defendant did not become joint-tenants or tenants in common of the dollars. 3. That although no specific dollars were separated from the residue for the plaintiffs, yet as the defendant had converted the whole, trover would lie for the plaintiff's share. Of course the action in its nature directly involved the plaintiff's title, and it was held that the sale or appropriation of a part without any separation was a perfect sale. In *Pleasants* v. *Pendleton*, 6 Rand. 473, the sale (omitting immaterial circumstances) was of one hundred and nineteen out of one hundred and twenty-three barrels of flour, situated in a warehouse, all of the same brand and quality. It was held by the Virginia Court of Appeals, upon very elaborate consideration, and after a review of all the cases, that the title was transferred by the sale. See also *Damon* v. *Osborn*, 1 Pick. 477; *Crofoot* v. *Bennett*, 2 Comst. 258. In the last mentioned, which was decided in this court, the sale was of forty-three thousand bricks in an unfinished kiln containing a larger quantity. A formal possession of the whole brick-yard was taken by the purchaser. It was held that he acquired title to the forty-three thousand, although no separation was made. In the opinion of Judge Strong, the case was made to turn mainly on a supposed delivery of the whole quantity. But, with deference, that circumstance does not appear to me to have been the material one, inasmuch as all the bricks confessedly were not sold. The delivery, therefore, did not make the sale, and if part could not be sold without being separated I do not see how a formal delivery of the whole brick-yard could cure the difficulty. The learned judge speaks of the transaction as a delivery of the whole quantity "with the privilege of selection." But assuming, as he did, that the want of selection or separation was the precise difficulty to be overcome, it is not easy to see how a privilege to select could change the title before the selection was actually made. The case, therefore, it seems to me, can only stand on the ground that the sale was, in its nature, complete; the formal delivery of the whole being doubtless a circumstance entitled to weight in arriving at the intention of the parties. The case is, in short, a strong authority to prove that, in sales by weight, measure or count, a separation of the part sold from the mass is not in all cases a fundamental requisite.

Referring now to cases where it has been held that sales of

this general nature were incomplete, it will be found that they are not essentially and necessarily opposed to the conclusion that, in the instance before us, the title was changed. In *White, Assignee, etc.*, v. *Wilks*, 5 Taunt. 176, a merchant sold twenty tons of oil out of a stock consisting of different large quantities in different cisterns, and at various warehouses. The note of sale did not express the quality or kind of oil sold, or the cistern or warehouse from which it was to be taken, and the purchaser did not even know where the particular oil lay which was to satisfy the contract. Very clearly the title could not pass upon such a sale; and so it was held, although the seller was entitled by the contract to charge "1 s. per ton per week rent," for keeping the oil. A very different question would have been presented if the cistern from which the twenty tons were to be taken had been specified. The mass and quality would then have been ascertained. As it was, the subject of the contract was not identified in any manner. The remarks of the judge, evidently not made with much deliberation, must be construed with reference to the particular facts of the case.

In *Austen* v. *Craven*, 4 Taunt. 644, there was a contract to sell two hundred hogsheads of sugar, to be of four different kinds and qualities which were specified. It did not appear that the seller, at the time of the contract, had the sugar on hand, or any part of it, and the fact was assumed to be otherwise. The sale was, moreover, at so much per cwt., requiring that the sugar should be weighed in order to ascertain the price. In these circumstances the case was considered plainly distinguishable from *Whitehouse* v. *Frost*, *supra*, and it was held that the title did not pass. I do not see the slightest ground for questioning the decision, although, perhaps, one or two remarks of Chief Justice Mansfield are capable of a wider application than the facts of the case would justify.

The two cases last mentioned have been not unfrequently cited in various later English and American authorities, which need not be particularly referred to. Some of these authorities may suggest a doubt whether the title passes on a mere sale note by measure or weight out of a larger quantity of the same kind and quality, there being no separation and no other circumstances clearly evincing an intention to vest the title in the purchaser. It is unnecessary now to solve that doubt, because none of the decisions announce the extreme doctrine, that where,

in such cases, the parties expressly declare an intention to change the title, there is any legal impossibility in the way of that design. Upon a simple bill of sale of gallons of oil or bushels of wheat, mixed with an ascertained and defined larger quantity, it may or may not be considered that the parties intend that the portion sold shall be measured before the purchaser becomes invested with the title. That may be regarded as an act remaining to be done, in which both parties have a right to participate. But it is surely competent for the vendor to say in terms, that he waives that right, and that the purchaser shall become at once the legal owner of the number of gallons or bushels embraced in the sale. If he cannot say this effectually, then the reason must be that two men cannot be owners of separate quantities or proportions of an undistinguishable mass. That conclusion would be a naked absurdity, and I have shown that such is not the law. In the case before us the vendor not only executed his bill of sale professing to transfer six thousand bushels of wheat, but waiving all further acts to be done, in order to complete the transaction, he acknowledged himself, by another instrument, to hold the same wheat in store as the bailee thereof for the purchaser. If his obligations from that time were not simply and precisely those of a bailee, it is because the law would not suffer him to stand in that relation to the property for the reason that it was mixed with his own. But no one will contend for such a doctrine.

I repeat it is unnecessary to refer to all the cases, or to determine between such as may appear to be in conflict with each other. None of them go to the extent of holding that a man cannot, if he wishes and intends so to do, make a perfect sale of part of a quantity without actual separation, where the mass is ascertained by the contract and all parts are of the same value and undistinguishable from each other.

One of the cases, however, not yet cited, deserves a brief consideration, because it was determined in this court, and has been much relied on by the plaintiffs' counsel. I refer to *Gardiner* v. *Suydam*, 3 Seld. 357. The owner of flour delivered it in various parcels to a warehouseman, and from time to time took receipts from him. One of these receipts was held by the defendants and others by the plaintiff, both parties having accepted and paid drafts on the faith thereof. The defendant's receipt was the first in point of time, and was for five hun-

dred and thirty-six barrels, being given at a time when in fact there were but two hundred and one barrels in the warehouse, so that it covered three hundred and thirty-five more than were then on hand. But other quantities were subsequently delivered at the warehouse, all of the same kind and quality, and the defendants, in fact, received by shipment to them, five hundred barrels. For the conversion of this quantity they were sued by the plaintiffs who had failed to receive the flour which their receipts called for. It cannot fail to be seen from this statement that the defendants, having the first receipt and receiving no more flour than it specified were entitled to judgment by reason of the priority of their title; and this ground of decision is very clearly stated in the opinion of the Chief Judge. He thought if the transfer of the receipts could pass the title to the flour, notwithstanding the mixture of all the quantities together, that the one held by the defendants entitled them not only to the two hundred and one barrels in store when it was given, but also to so many barrels delivered in store afterwards as were necessary to make up their number. This view, which appears to me correct, was fatal to the plaintiffs' case. But in another aspect of the controversy, the learned chief judge was of opinion that the transfer to the plaintiffs of the receipts held by them passed no title, on the ground that the quantities which they respectively covered were all mixed together in the storehouse. Assuming the correctness of that view—which I am constrained to question—the case is still unlike the present one. The transfer of a warehouseman's receipt, given to the owner, was certainly no more than a simple sale note of the specified number of barrels; and where, in such cases, that is the whole transaction between vendor and vendee I have already admitted a doubt, suggested by conflicting cases, whether the title passes. If the owner of the flour had held it in his own warehouse, and had not only given a bill of sale of a portion of it, but had himself executed to the purchaser another instrument declaring that he held the quantity sold as bailee and subject to order, then the case would have resembled the one now to be determined.

We are of opinion, therefore, both upon authority and clearly upon the principle and reason of the thing, that the defendant, under the sale to Shuttleworth, acquired a perfect title to the six thousand bushels of wheat. Of that quantity he took pos-

session at Buffalo, by a writ of replevin against the master of the vessel in which the whole had been transported to that place. For that taking the suit was brought, and it results that the plaintiff cannot recover. It is unnecessary to decide whether the parties to the original sale became tenants in common. If a tenancy in common arises in such cases, it must be with some peculiar incidents not usually belonging to that species of ownership. I think each party would have the right of severing the tenancy by his own act: that is, the right of taking the portion of the mass which belonged to him, being accountable only if he invaded the quantity which belonged to the other. But assuming that the case is one of strict tenancy in common, the defendant became the owner of six thousand and the plaintiffs of two hundred and forty-nine parts of the whole. As neither could maintain an action against the other, for taking possession merely of the whole, more clearly he cannot if the other takes only the quantity which belongs to him.

The judgment must be reversed and a new trial granted.

GRAY and GROVER, JJ., dissented; STRONG, J., expressed himself as inclined to concur, if necessary to a decision, but it being unnecessary, he reserved his judgment.

Judgment reversed and new trial ordered.

RUSSEL ET AL. v. CARRINGTON ET AL.

(42 New York, 118.—1870.)

LOTT, J. The following are the material facts in this case, as found by the judge who tried the issues therein without a jury. The plaintiffs on the eleventh day of August, 1858, bargained with the defendants for the purchase from them of 400 bushels of corn, parcel of a cargo of corn from the schooner St. Helena, which was then stored in a warehouse in Oswego, known as the Empire elevator, at a price agreed upon, which was paid to the defendants, and they gave a bill of sale receipted therefor. The defendant Carrington owned two thirds of the elevator, and the other third was owned by one Smith, and was in charge of Philander Rathbun. The corn was stored there

for account of Luther Wright, and Rathbun was authorized to deliver it only upon the orders of Wright. The defendants, immediately after giving the receipt, drew an order upon Wright (calling him superintendent), and delivered it to him for the delivery to the plaintiffs of "four hundred bushels of corn from cargo, schooner St. Helena, account of same," (but of which order the plaintiffs had no knowledge till the trial of the action), and upon such delivery thereof, Wright gave the defendants an order in the following terms:

"GENERAL SUPERINTENDENT'S OFFICE,
"OSWEGO, Aug. 11, 1858.

"*To Empire Elevator:*

"Deliver to R. & McCarthy four hundred bushels of corn, from cargo of St. Helena, taking a receipt for the same.

"400 bushels.

"L. WRIGHT,
"*Superintendent.*"

This order was delivered by the defendants to the plaintiffs, who left it with their agents, with instructions to deliver it to the master of the schooner Northerner on her arrival at Oswego.

When the said bargain was made, the plaintiffs informed the defendants that they wanted the corn to make out a cargo of 2,000 bushels, and that they wished it to ship by the said schooner, which would arrive at Oswego in about two days from that time, but she did, in fact, arrive on the next day at between ten and twelve o'clock in the afternoon.

On the following morning, and before the presentation of the order given by Wright, the elevator was consumed by fire, and its contents, including the corn in question, were destroyed or greatly damaged, without fault or negligence of the defendants. The 400 bushels of corn were in no way separated from the rest of the cargo of the St. Helena, and remained in the elevator, until its destruction by fire as above stated.

The master of the Northerner subsequently presented the order of Wright to the defendants, and demanded the 400 bushels of corn on behalf of the plaintiffs, but the defendants refused to deliver that corn, or any other corn to the plaintiffs, by telling them they "must call on the association; that the defendants had nothing to do with the corn, and that the corn

had been damaged and destroyed;" but they "did not in any way refuse to deliver the corn."

The judge upon these facts found as conclusions of law, that the sale of the corn was not consummated; that the contract for the sale remained executory; and the defendants having failed to deliver the corn, the plaintiffs were entitled to recover the price paid therefor, with interest from the time of such payment, and ordered judgment therefor.

At the close of the testimony the defendants requested the judge to find that the sale of the corn in question was complete and perfect upon the receipt by the plaintiffs of Wright's order and the bill of sale and the payment of the purchase money, and also that the giving of the said order by the defendants on Wright and the acceptance from them by the plaintiffs of his order on the elevator, was, in law, a delivery of the said corn to the plaintiffs. Each of those requests was refused, and proper exceptions to such refusal, and also to the several conclusions of law by the judge, were properly taken.

The material question arising thereon is whether the title to the corn in question had passed to and become vested in the plaintiffs at the time of the fire.

It must, in our opinion, be deemed to have been established by the decision in *Kimberly* v. *Patchin*, 19 N. Y. Rep. p. 330, as well expressed in the headnote thereto, that "upon a sale of a specified quantity of grain, its separation from a mass, undistinguishable in quality or value, in which it is included, is not necessary to pass the title when the intention to do so is otherwise clearly manifested."

In that case, the owner of wheat lying in his warehouse sold 6,000 bushels thereof for a specified price, and gave to the purchaser a receipt that he had received it in store for him, subject to his order, but it was never separated from the residue thereof, and was never, in fact, delivered to him. The vendor afterward sold the whole to the plaintiffs in the action, and they claimed title under their purchase, and the question involved was which purchaser had the superior title. COMSTOCK, J., in giving the opinion of the court, says that the first sale was not in bulk, but precisely of the 6,000 bushels, and on that ground it was claimed by the plaintiffs that, although the parties intended a transfer of the title to the purchaser, the law overruled that intention, although expressed in plain written language entirely appropri-

ate to that purpose. He then, after an elaborate examination of the question on principle and conflicting authorities, comes to the conclusion that, in relation to grain and property of that nature, "when the quantity and general mass from which it is to be taken are specified, the subject of the contract is thus ascertained, and it becomes a possible result for the title to pass if the sale is complete in all its other circumstances;" and that none of the cases go to the extent of holding that a man cannot, if he wishes and intends so to do, make a perfect sale of a quantity, without an actual separation, where the mass is ascertained by the contract, and all parts of the same value and undistinguishable from each other; and it was held that the intent to vest the title to the whole in the first purchaser was evinced by the seller's receipt declaring that the property was held subject to his order, and that he acquired a perfect title thereto.

Upon the application of the principle established in that case to the facts in this, there appears to be no valid ground for questioning the plaintiffs' title to the corn in question. It is true that there was no express declaration given by the defendants that they held it subject to the plaintiffs' order, but the intention to vest them with the title appears to be clear and unquestionable. It is shown that the plaintiffs informed the defendants, at the time of making the bargain for the purchase, that they wanted the corn to make up a cargo of 2,000 bushels, to be shipped by the schooner Northerner, which was expected to arrive in about two days from that time, and what was done was sufficient to enable them to obtain its delivery without any further application to the defendants. The order of Wright was effectual for that purpose. None other would have been available. The corn was stored for his account, and it is expressly found that Rathbun, who had charge of the elevator, was authorized to deliver it only on the order of Wright. When, therefore, that was obtained by the defendants, on their written request to him to make such delivery, they, on giving it to the plaintiffs, lost all control over the corn, and he, from that time, may be considered their bailee; but if he did not hold that relation to them, they were entitled, on the presentation of his order, to the possession of the property, and could have enforced its delivery after a demand and a refusal. These views are entirely consistent with the rule laid down by Mr. Parsons (in 1 Parsons on Contracts, 3d ed. page 441), cited by

the defendants' counsel, where he says: "The sale is not completed until the happening of any event expressly provided for, or so long as anything remains to be done to the thing sold to put it in a condition for sale, or to identify it or discriminate it from other things, or determine its quantity if the price depends on this, unless this is to be done by the buyer alone;" and the court below, in the prevailing opinion, says: "The general rule on the subject is sufficiently expressed in the proposition that, when anything is to be done by the vendor in order to ascertain the value, quality or quantity of the goods sold, the delivery is not complete and the property does not pass to the vendee. So long as anything remains to be done to put the article or commodity sold in a condition for sale, or to discriminate it from other things with which it is intermixed, or to determine the price when that is dependent upon the quantity, the sale is not completed."

The rule referred to, both by Mr. Parsons and the court below, is not applicable where the vendor is not to do the thing required, and it is said in note (*t*), to the rule laid down by Mr. Parsons: "It is held that, if the parties intended that the sale should be complete before the article is weighed or measured, the property will pass before this is done." The bill and receipt are evidence of such an intent. A receipt admits that a sale has been had, and it is an acknowledgment of a past sale. This principle was asserted by Wright, J., in *Filkins* v. *Whyland*, 24 N. Y. Rep. 341; and in the absence of a finding that anything further was to be done by the defendant, the presumption is, that it was a perfect and complete sale.

The above considerations lead us to the conclusion that the sale of the corn was consummated, and that the transaction was not merely an executory contract.

Assuming that to be the true construction of the dealings between the parties, it follows that the title to the corn had passed to and become the property of the plaintiffs. The fact that there had not been an actual delivery of it is not material. That, Judge Comstock says, in the opinion referred to, at pp. 333, 334: "is not indispensable in any case to pass a title, if the thing to be delivered is ascertained, if the price is paid or a credit given, and if nothing further remains to be done in regard to it;" and in *Terry* v. *Wheeler*, 25 N. Y. Rep. 520, it was expressly held that a delivery was not necessary.

In that case, the vendor of a pile of lumber, which was selected and paid for, agreed to deliver it free of cartage at a railroad station, but before its delivery it was accidentally destroyed by fire, and the assignee of the purchaser sued to recover the purchase-money. It was held, Judge Selden giving the opinion, that the title was in the vendee, citing in support of the decision, Chitty on Contracts, 8th Am. ed. p. 332, and *Olyphant* v. *Baker*, 5 Denio, 382, and said: "Where the sale appears to be absolute, the identity of the thing fixed, and the price for it paid, I see no room for an inference that the property remains the seller's merely because he agreed to transport it to a given place. I think in such case the property passes at the time of the contract, and that in carrying it, the seller acts as bailee, and not as owner."

It follows, from the views above expressed, that the decision of the judge on the trial was erroneous, and that the judgment entered thereon, and of the General Term in affirmance thereof, should both be reversed and a new trial ordered, costs to abide the event.

SMITH, FOSTER, INGALLS and SUTHERLAND, JJ., concur with LOTT for reversal.

GROVER, J., was also for reversal, on the authority of *Kimberly* v. *Patchin*, solely.

HUNT, J., and EARL, Ch. J., for affirmance.

Judgment reversed and new trial granted.

COMMERCIAL NATIONAL BANK v. GILLETTE.

(90 Indiana, 268.—1883.)

ELLIOTT, J. The Elkhart Car Company, by a written contract, sold to the appellant 510 car wheels, constituting a part of 1,100 wheels; at the time of the sale the wheels were in one common mass, and there was no separation nor any designation of the wheels sold to the appellant; after the execution of the contract the entire lot of wheels was seized upon executions

issued at the suit of appellee, and this action was brought for the possession of those sold.

The contention of appellee is that appellant acquired no title, because the articles sold were not designated or separated from the common lot of which they formed a part, and this contention prevailed in the court below.

There is much strife in the American cases upon this question, but none in the English. The weight of the former is, perhaps, with the theory of appellant, but the text-writers are, so far as we have examined, all with the English decisions. Our own cases are in harmony with the long established rule of the common law. In the case of *Bricker* v. *Hughes*, 4 Ind. 146, the English rule was approved and enforced. In *Murphy* v. *State*, 1 Ind. 366, the court said: "To render a sale of goods valid, the specific, individual goods must be agreed on by the parties. It is not enough . . . that they are to be taken from some specified larger stock, because there still remains something to be done to designate the portion sold, which portion, before the sale can be completed, must be separated from the mass." This doctrine found approval in *Scott* v. *King*, 12 Ind. 203, and there are other cases recognizing it as the correct one, among them *Moffatt* v. *Green*, 9 Ind. 198; *Indianapolis, etc., R. W. Co.* v. *Maguire*, 62 Ind. 140; *Bertelson* v. *Bower*, 81 Ind. 512; *Lester* v. *East*, 49 Ind. 588, *vide* opinion, p. 594. The rule which our court has adopted is upheld by the American cases of *Hutchinson* v. *Hunter*, 7 Pa. St. 140; *Haldeman* v. *Duncan*, 51 Pa. St. 66; *Fuller* v. *Bean*, 34 N. H. 290; *Ockington* v. *Richey*, 41 N. H. 275; *Morrison* v. *Woodley*, 84 Ill. 192; *Woods* v. *McGee*, 7 Ohio, 467; *McLaughlin* v. *Piatti*, 27 Cal. 463; *Courtright* v. *Leonard*, 11 Iowa, 32; *Ropes* v. *Lane*, 9 Allen, 502; *Ferguson* v. *Northern Bank*, 14 Bush, 555, (29 Am. R. 418). In Michigan, the rule seems not to be definitely settled, but in a late case it was said: "To the elaborate argument made for the defence to show that there can be neither a sale nor a pledge of property without in some manner specially distinguishing it, we fully assent, and we have no purpose to qualify or weaken the authority of *Anderson* v. *Brenneman*, 44 Mich. 198." *Merchants', etc., Bank* v. *Hibbard*, 48 Mich. 118; *S. C.* 42 Am. R. 465.

The civil law rule is the same as that of the common law,

and our great lawyers have given it unhesitating approval. 2 Kent, Com. 639; Story, Sales, sec. 296.

The American cases which have departed from the long settled rule, are built on the cases of *Kimberly* v. *Patchin*, 19 N. Y. 330, and *Pleasants* v. *Pendleton*, 6 Rand. 473, and these cases proceed upon the theory that commercial interests are best promoted by a rigid adherence to the rule which the sages of the law have so long and so strongly approved. The rule secures real transactions and actual sales, and thus checks the wild spirit of speculation. It prevents, in no small measure, the making of mere wagering contracts; it puts business on a stable basis, and makes it essential that there should be real, and not sham, transfers of property; it makes titles secure, protects creditors and purchasers and represses fraud. If it were granted that the rule does somewhat interfere with the freedom of business transfers, still the good it produces far outweighs this inconvenience. But we do not believe it does interfere with actual business transfers, for common experience informs us that real sales are seldom, if ever, made without a specific designation of the thing bought. The rule may interfere with dealers in "margins," makers of "corners," and framers of "options," and to affirm that it does do this is to give it no faint praise. In principle the rule is sound, and in practical operation salutary.

The efforts made by the courts that have departed from it to make exceptions. to manufacture distinctions and point out differences in order to escape disastrous consequences, affords strong evidence of the wisdom of the rule. The line of decisions in some of the States, where a departure has been taken, is a devious and tortuous one, and this is to be expected when once sound principle is turned from and new rule sought and adopted which have no support in fundamental principles.

We have no disposition to depart from the rule which has so long prevailed in this state and elsewhere.

Judgment affirmed.

GROAT ET AL. V. GILE.

(51 New York, 431.—1873.)

IN May, 1864, defendants sold two flocks of sheep to the plaintiffs. At the time of the sale, the sheep were in two fields, and were examined by plaintiffs who bought the whole, excepting two bucks and a lame ewe, at $4.00 a head. Plaintiffs paid $25.00 on account, and agreed to take them away a few months later. Before they were taken away, the defendants sheared the sheep and converted the wool.

Verdict for plaintiffs was set aside by the General Term of the Supreme Court.

LOTT, Ch. C. As the verdict at the circuit in favor of the plaintiffs was ordered by the judge who tried the action on the version given by the defendant of the contract or agreement between the parties, it becomes necessary to refer to it with particularity for the purpose of ascertaining whether his conclusion of law based thereon was correct.

The defendant, on his direct examination, after stating that the plaintiffs called on him about the 20th of May, 1864, and that he and the plaintiff Groat had some conversation about the purchase of his sheep and lambs, in which he said that he wanted to sell the old sheep with the lambs, and that he would ask four dollars apiece for them, testified as follows: "They concluded to go and see the sheep; I told them where they were; one flock was near a mile from the house; they went off together; went to the further lot first; when they came back from this lot I told them where the others were; I told them I did not believe they would like that lot; they did not look as well as the others, as some of them had lost their wool; then they went off to see the other lot and came back; they asked me how many sheep and lambs there were; I told them I could not tell how many there were; I did not know myself; I think I said in the neighborhood of so many sheep and so many lambs; then they inquired about taking the sheep; it was agreed that they should take the lambs the middle of September and the old sheep the first of November, and pay me four dollars apiece for sheep and lambs; this was the con-

tract; think I told them I would give them a good chance; something was said about cutting the lambs' tails off; I told them I thought it was not prudent; I tried to dissuade them from having it done; that they had got too large and might die; something was said in answer to it, but I don't know just what; they asked me if the sheep were sound after they had been to see them; I told them I did not consider them entirely sound; then they asked that I should doctor the sheep if they needed it; I told them I would; after the talk they handed me over twenty-five dollars to bind the bargain, as they said; then they went away." On his cross-examination, he said: "When Groat and Jacobia were there in May, I had sheep in two lots: the sheep I sold them were in the lots mentioned; I sold them all that were in these lots; did not know how many sheep I had; had not counted them for some time; sometimes they die; told them I did not know how many I had; that there would be in the neighborhood of ninety old sheep; they were to take all the sheep in the two lots, except two bucks and a lame ewe; they got all the sheep in the two lots except two bucks and a lame ewe; they agreed to give four dollars per head; in the bargain they were to have all the sheep except two bucks and a lame sheep; I agreed to sell the sheep at that price; nothing was said about the wool; they got ninety-two old sheep and seventy-one lambs." And on further redirect examination he said: "When they made the contract for these sheep, there was nothing said about the wool." And also: "Some of the lambs came in March, and so along, and some were only a few days old; some time in August is the usual and proper time for taking lambs from sheep; they had not been separated from the sheep on the nineteenth of May; the lambs were in no condition to be separated from the sheep, at that time, without ruining the lambs."

The preceding statement of the defendant's evidence contains all that relates to the negotiation and making of the agreement, and fully justifies the construction given to it by the learned judge at the circuit. It is clear that the plaintiffs intended to buy of the defendant, and that it was his intention to sell to them *all* of the sheep and lambs that were running in the two lots of land referred to by him (except two bucks and a lame ewe, as to the identity of which there was no question), at four dollars per head, and that no further or other designa-

tion or selection was contemplated. All the parties understood what particular sheep and lambs were intended to be sold, and there is no doubt that these were sufficiently identified. Indeed, that fact does not appear to have been disputed on the trial. Under such circumstances, when the terms of the sale were agreed on and the payment of twenty-five dollars was made to the defendant on account of the purchase-money by the plaintiffs, their liability became fixed for the balance, which was ascertainable by a simple arithmetical calculation based upon a count of the sheep and lambs and the price to be paid per head for them. No delivery of them or other act whatever in relation to them by the defendant was required or intended. The plaintiffs were to *take* them without any agency in delivering them on the part of the defendant, and they, from the time the agreement was made, became the owners thereof. The defendant subsequently kept them at the risk of the plaintiffs. Chancellor Kent, in his Commentaries, vol. 2, p. 492, in stating the rule governing sales at common law, says: "When the terms of sale are agreed on and the bargain is struck and everything that the seller has to do with the goods is complete, the contract of sale becomes absolute as between the parties, without actual payment or delivery, and the property and the risk of accident to the goods vests in the buyer." This rule is modified by our statute of frauds so far as to require, in certain cases, that a note or memorandum of the contract shall be made in writing and subscribed by the parties to be charged, or that the buyer shall accept and receive a part of the property sold, or at the time pay some part of the purchase-money; and in such cases, he says, at p. 499: "When the bargain is made and is rendered binding by giving earnest, or by part payment, or part delivery, or by a compliance with the requisition of the statute of frauds, the property, and with it the risk, attach to the purchaser; but though the seller has parted with the title, he may retain possession until payment." The fact that the number of the sheep and lambs sold was not ascertained at the time the terms of sale were agreed on did not prevent the application of the rule referred to in this case. It is true that the same learned jurist, after stating that "it is a fundamental principle, pervading everywhere the doctrine of sales of chattels, that if goods of different values be sold in bulk and not separately and for a single price, or *per aversionem*, in the language of the civil-

ians, the sale is perfect and the risk with the buyer," adds, "but if they be sold by number, weight or measure, the sale is incomplete, and the risk continues with the seller until the specific property be separated and identified." The present case is not one of the latter class. That rule has reference to a sale, not of *specific* property clearly ascertained, but of such as is to be separated from a larger quantity, and is necessary to be identified before it is susceptible of delivery. The rule or principle does not apply where the number of the particular articles sold is to be ascertained for the sole purpose of ascertaining the total value thereof at certain specified rates or a designated fixed price. This distinction is recognized in *Crofoot* v. *Bennett*, 2 Comst. 258; *Kimberly* v. *Patchin*, 19 N. Y. 330; *Bradley* v. *Wheeler*, 44 id. 495. The sale in question was in fact of a particular lot of sheep and lambs, and not of a certain undesignated number to be selected and delivered at a future time, and the postponement of the time for taking them away did not prevent the title passing to the plaintiffs.

A sale of a specified chattel may pass the property therein to the vendee and vest the title in him without delivery. (See Chitty on Contracts, 8th American ed., p. 332, and *Terry* v. *Wheeler*, 25 N. Y. 520.)

All the parties appear to have understood the transaction, at the time it took place, as a present absolute sale and change of title. What was said about cutting the lambs' tails off and doctoring the sheep, if they needed it, is evidence of such understanding, and there is nothing in what is said to have been the agreement about taking them away inconsistent with it. That gave the plaintiffs the privilege of leaving them in the defendant's pasture till the time specified for taking them away, but did not deprive them of the right to take them before, if they chose so to do. The remark of the defendant at the time to the plaintiffs, that he "would give them a good chance," shows that such was its object and intention. It is proper, moreover, to consider the statement in reference to such agreement in connection with what had been previously testified to by the plaintiffs, and which was not denied by the defendant, and therefore impliedly admitted, to the effect that Groat, one of the plaintiffs, before going to look at the sheep and lambs, had stated to the defendant that he had no pasture for them, to which he replied that he had lots of pasture and would keep them for the plain-

tiffs if they purchased, and that they, after looking at them, had stated to him that they would take them at the price named, if the parties could agree upon the time for keeping them. Considered in that connection, it is clear that the agreement was one for the plaintiffs' accommodation and an inducement to them to make the purchase at the price asked, which had been fixed irrespective of their subsequent pasturage on the defendant's land. It affords no ground or warrant for saying that the defendant, during the time they were so kept, intended to assume and bear all the risks incident to a continuance of his ownership of them, and consequently that the purchase-money receivable by him should depend on the number that should be living at the time specified or limited for that purpose. On the contrary, the fact that the price at which they were sold, was that named by him when the first application to him to sell them was made, without reference to the question of the future keeping of them in his pasture, and the other circumstances attendant on the transaction, as stated by him, clearly show that such was not his intention.

It follows, from what has been said, that there was no error in the ruling of the judge that the title to the sheep passed to the plaintiffs immediately upon the completion of the contract and the payment of the twenty-five dollars by them. That necessarily carried with it the right to the wool on them, it being shown that there was no reservation thereof or anything said about it during the negotiation or at the time the contract was made. It is not a mere presumption, as stated in the prevailing opinion in the Supreme Court, that the parties "intended, in the absence of evidence to the contrary, that the title to the wool should follow the title to the sheep." As was well said by Justice Ingalls in his dissenting opinion: "When the sheep were sold the wool was grown and was a part of the sheep, adding to their value," and there is no reason or principle for saying that such particular part did not pass to the purchaser with the rest of the animals. The sale was of the *entire* animal and not of different parts or portions constituting it, or of what it was formed.

Assuming, then, that the legal effect of the agreement of the parties, as testified to by the defendant himself, was to vest the title to the wool in the plaintiffs, it was clearly incompetent to show a custom in Columbia county where the transaction took

place, that the wool of sheep sold, under the circumstances disclosed, does not go to the purchaser. (See *Wheeler* v. *Newbould*, 16 N. Y. 392, 401; *Higgins* v. *Moore*, 34 id. 417; *Bradley* v. *Wheeler*, 44 id. 495.)

There were several offers of evidence by the defendant which were rejected by the court. Among them were the following: 1st. That the plaintiff, Groat, on a previous occasion, purchased a number of sheep and lambs of the defendant under an arrangement precisely similar to the present, and that he did not claim the wool; 2d. That the plaintiffs admitted to a witness, on being offered $100 for their bargain with the defendant and to take the sheep and lambs off their hands, allowing the defendant to have the wool, refused the offer and said that the sheep, without the wool, were worth more money than the offer; and 3d. That the plaintiff, Groat, admitted that he did not understand he had bought the wool in question, or think of making any claim to it until his co-plaintiff suggested that they could hold it.

These were properly excluded. It was immaterial to the present controversy what the plaintiffs, or either of them, had claimed of the defendant under a previous sale. Their legal rights could not be controlled under the present contract by a failure to demand what they were entitled to under a previous one, and it cannot be held that the wool, under this agreement, was excepted from the operation of the sale, because one of the plaintiffs did not assert his rights under another, and it could not aid in determining what the contract in dispute was, whether or not the purchase of the sheep was so profitable as to cause the plaintiffs to reject the offer made them for their bargain. Nor could the understanding of one of the plaintiffs, as to the question whether he had bought the wool or not, alter the effect of the transaction or the contract actually entered into. What he in fact did buy was the question, and that did not depend on what he understood, but on the agreement. The defendant was also asked what was the value of the sheep without the wool under the arrangement he had testified to. That question was properly excluded; the inquiry was wholly irrelevant. The parties could make such agreement as they saw fit, and it was immaterial whether the defendant sold the property in question for more or less than it was worth, in the absence of any fraud or other evidence affecting its validity.

There was a request to charge the jury that if the statement

of the defendant was correct, then the sum of $25.00 paid by the plaintiffs was merely paid to bind the bargain and take the contract out of the statute of frauds, and that the title to the sheep did not thereby pass absolutely to the plaintiffs. This was refused, and what has already been said as to the legal effect of that statement, shows that such refusal was correct.

The court was then asked by the defendant to submit the following questions to the jury:

1st. Whether the contract in suit was executed or executory; whether it was the intention of the parties that the title to the sheep should pass to the plaintiffs immediately upon the making of the contract or at some future period.

2d. Whether the defendant, upon the making of this contract, intended to sell or the plaintiffs to buy the wool in question in this suit; and on his refusal so to do, and after proper exceptions were taken, he was requested to charge the jury that if the contract was executory and it was not the intention to pass the title to the sheep until delivery and payment, then the wool sheared from the sheep, before they were actually delivered and paid for, belonged to the defendant. This was also refused and an exception was taken to such refusal.

There was no error to submit those questions or give that instruction to the jury. They all involved the submission of matters of law to their consideration and determination. The court had previously decided that the terms, nature and effect of the contract should be determined and controlled by the defendant's statement, or version of it, which was the most favorable view in which it could be considered for him. The case was thus substantially one in which there was no dispute of facts as to the terms of the agreement, and it therefore became a question of law to be determined by the court whether the contract was executed or executory, and what was the intention of the parties (to be ascertained from the contract) as to the nature, extent and effect of the sale.

The only remaining question to be considered relates to the rule of damages laid down by the court, which he stated to be "the highest market price of wool between the time of the demand and the time of trial, with interest from the time of the demand."

It may be questionable whether the instruction as to the right to recover interest is correct; and I understand, from the points

of the counsel of the defendant, that he only makes objection on this appeal to that portion of the charge. That question was not presented by his exception, which was to the entire instruction and not to the allowance of interest only. The part allowing a recovery for the highest market value between the conversion and the time of trial, was held by us in *Lobdell* v. *Stowell*, (decided at the September term, 1872, to be the proper rule or measure of damages or compensation, on the authority of *Romaine* v. *Van Allen*, 26 N. Y. 309; *Burt* v. *Dutcher*, 34 id. 493; *Markham* v. *Jaudon*, 42 id. 235). There was, therefore, no ground of complaint to that portion of the charge. The exception being to that as well as to the portion relating to the interest was too broad and consequently not well taken, and is not available as a ground for setting aside the verdict in favor of the plaintiffs and granting a new trial.

The result of the views above expressed is, that the order of the General Term granting such new trial should be reversed, and judgment must be ordered against defendant on the verdict with costs.

All concur.

Order reversed and judyment accordingly.

Olyphant v. Baker.

(5 Denio, 379.—1848.)

Assumpsit for the balance of the purchase price of a quantity of barley. Plea, *non assumpsit*. The following contract in writing, signed by the defendant only, was given in evidence:

"I hereby agree to sell seven hundred bushels of barley, (or what I may have in store at Mr. P. Church, Jr.'s warehouse,) to Abner Baker, [the defendant,] at the rate of forty-five cents per bushel; to be delivered when said Baker may call for it. I agree to hold the barley free of storage until the first day of January next. The barley is to be weighed out of the warehouse, unless Mr. Baker shall agree to take the weight on the books. I hereby acknowledge the receipt of one hundred dollars on the above contract. Mount Morris, Dec. 15, 1845."

The plaintiff owned the warehouse, called P. Church, Jr.'s in

the contract, and before the contract was made had rented it to one Camp from and after the first day of January then next; and of this he informed the defendant when the contract was made. On that day, or very soon afterwards, the defendant saw Camp and agreed with him for the storage of the barley, for him, the defendant, from the first of January until the opening of navigation the ensuing spring. Camp took possession of the warehouse under his lease on the first day of January, the barley still remaining in it. After this arrangement with Camp and on the 22d day of December, the plaintiff's clerk called on the defendant with a bill of the barley, and asked for payment. The defendant paid him $300 and promised to pay the balance—$95.00—the next day. The witness could not say that the bill mentioned the number of bushels of the barley, but it contained the aggregate amount that it came to, and the witness did state to the defendant that there was a little over 1,100 bushels of it. The exact quantity, he said, was a little over 1,112 bushels. About the middle of January, the building with the grain in it was accidentally destroyed by fire.

The referee reported in favor of the defendant, and the plaintiff moved to set aside the report.

WHITTLESEY, J. The sole question here is whether there was a delivery of the barley to the defendant, who was the purchaser. In many cases of sales of personal property it is a very nice and difficult question to determine whether there has been a delivery—whether the title has passed. In this case the contract was executory. The quantity of barley was uncertain, and as it was sold by the bushel, the whole price could not be known until the quantity was ascertained. The seller was entitled to immediate payment, at any rate he was entitled to payment before he parted with the property. The purchaser was entitled to the delivery whenever he chose to ask for it, but he could not claim to have it delivered without paying the price. He was entitled to have it weighed out to him, if he chose, for the purpose of ascertaining the exact quantity and aggregate amount of the purchase money. He could, however, if he chose, take the weight as it appeared from the books. If he had taken such weight as the true quantity, and paid the whole price according to such weight, the barley would have

been deemed to have been delivered from the time of such payment. (*Lansing* v. *Turner*, 2 John. 13.)

But there was a sale by weight or measure at so much per bushel, and in such cases, as it is necessary that the thing should be weighed or measured before the price can be ascertained, the contract is not consummated so as to change the property until such weighing or measurement is had; but it remains at the risk of the vendor. (Pothier, *Traite du Contrat de Vente*, part 4, 308.) In our reports it is held that when, after a sale of goods, some act remains to be done by the vendor before delivery, the property does not vest in the purchaser, but continues at the risk of the vendor. Such previous act may be counting, weighing, measuring, or inspecting, etc. (*McDonald* v. *Hewett*, 15 John. 349; *Outwater* v. *Dodge*, 7 Cowen, 85; *Hanson* v. *Meyer*, 6 East, 614; *Rapelye* v. *Mackie*, 6 Cowen, 250; *Russell* v. *Nicoll*, 3 Wend. 112; *Ward* v. *Shaw*, 7 id. 404; *Downer* v. *Thompson*, 2 Hill, 237.) Even if there has been a delivery to the vendee, and anything remains to be done preparatory to ascertaining the price of the goods, the delivery does not divest the title of the vendor until the price be ascertained and paid. (*Andrew* v. *Dieterich*, 14 Wend. 31.)

In this case it does not clearly appear that the precise quantity of the barley was ascertained and communicated to the defendant. The witness says, indeed, that there were 1,112 bushels and some pounds, and that he made out a bill and presented it to the defendant; but he does not state that the precise quantity of the barley was put in such bill; and on his cross-examination he states that he is not quite certain that he stated the precise amount of the barley in the bill, but he did state to him there was a little over 1,100 bushels. The defendant took the bill, paid the greater part, and promised to pay the balance the next day. Is this evidence that the defendant agreed to take the weight as it appeared on the books? If it is to be so taken, as no objection was made to the weight in the bill, is it to be deemed that the plaintiff assented to parting with the property until the balance of the purchase money was paid? The plaintiff had a right to insist that the whole price should be paid before the property was delivered, and if the defendant had assumed to dispose of it before the payment of this balance, or had undertaken to remove it, and it should be

found that he was insolvent, could not the plaintiff claim the property?

The making of the bargain for the storage of the barley after the first of January was doubtless a strong circumstance, but was not of itself conclusive. There is a class of cases which determine that though something remains to be done to ascertain price, etc., yet if it clearly appears to be the intention of the parties that the property shall be deemed to be delivered and the title pass, it will be so held. (*Macomber* v. *Parker*, 13 Pick. 178; *Riddle* v. *Varnum*, 20 id. 280.) There does not appear to be anything in this case to show any different intention of the parties than that which the law presumes from their acts. The case is not analogous to those above referred to. It is one of some nicety, but on the whole I think the motion to set aside the report of the referee should be denied.

BEARDSLEY, Ch. J. It is a general rule of the common law that a mere contract for the sale of goods, where nothing remains to be done by the seller before making delivery, transfers the right of property, although the price has not been paid, nor the thing sold delivered to the purchaser. (Long on Sales, 42; Ross on Pur. & Vend. 1; 2 Kent, 492; *Simons* v. *Swift*, 5 B. & C. 857; *Tarling* v. *Baxter*, 6 id. 360.) In this case the price per bushel for the barley was specified in the written contract, although the precise quantity sold was not then known to the parties; that, according to the contract, was to be ascertained by weighing the barley, unless the defendant should agree to take it as the weight might appear on the warehouse books. When the contract of sale was made, it was impracticable to determine what amount, in the whole, was to be paid by the purchaser, for that would depend upon the quantity of barley sold, to be ascertained in one of the modes agreed upon; it may therefore well be that this contract of sale did not, *ipso facto*, *et eo instanti*, transfer the right of property to the purchaser.

The barley was not afterwards weighed by any one; that mode of ascertaining the amount of the purchase money may therefore be thrown out of view. Let us, however, see if it was not, in another way, completely adjusted between the parties.

About a week after the contract of sale had been entered into

the plaintiff's clerk made out a bill of the barley sold to the defendant, stating the amount which it came to, although it does not appear that the precise quantity was mentioned. This bill was handed to the defendant and payment demanded. He paid $300 thereupon, and according to the evidence, agreed to pay the balance, that is $95.00, within a day or two. It is but reasonable to understand from the evidence on this point, although not stated in so many words, that the bill was made out from the warehouse books, and if so the defendant's engagement to pay the balance according to the bill, was an unequivocal agreement to abide by the weight of the barley as stated in said books. But even if the bill was not made out as I have supposed, but was a mere estimate of the quantity, the assent of the defendant to that estimate, as proved by the payment of $300 on the bill and his agreement to pay the balance as stated, would entirely supersede the necessity of ascertaining, in any other way, the weight of the barley sold and the consequent amount of the purchase money. From this time, as the agreement for the sale was absolute and the amount of the purchase money had been fully adjusted between the parties, the right of property, as I think, clearly vested in the purchaser. Nothing then remained to be done by the seller before delivery was made; and although he still had possession and a lien for the purchase money, the right of property was in the buyer, and with it the risk of all accidents devolved on him. (See the authorities already referred to.)

This view, as it seems to me, would dispose of the case, but there is another which leads to the same result, for the barley was in fact actually delivered to and received by the defendant.

When the written contract of sale was made, which was on the 15th of December, the barley was in the plaintiff's warehouse. The defendant was then informed by the plaintiff that he had rented the warehouse to one Camp, from the 1st day of January then next, and that the defendant must make an arrangement for the storage of the barley from that time with Camp. The evidence shows that on the day of making the contract of purchase, or within a day or two thereafter, the defendant agreed with Camp that the barley should remain in store with him until the next spring, for which the defendant was to pay a price then specified and assented to by both parties. On the first of January Camp went into possession of the ware-

house under his lease from the plaintiff, and at the same time took charge of the barley for the defendant, as had been agreed between them. This gave to the defendant as full possession of the barley as he would have acquired by removing it to his own store-house, and his right of property was previously complete by the purchase. Property, the right of possession and the actual possession, were here united, and the plaintiff had no longer any right whatever to the barley. His lien for the purchase money was gone, as he had voluntarily transferred the possession of the barley to the defendant. The defendant's arrangement with Camp, for the storage of the barley, was made at the request of the plaintiff, and the transfer of the possession was with his full assent. It amounted to an unqualified relinquishment of all right, on the part of the plaintiff, and a complete acquisition of both possession and property by the defendant. (2 Kent, 500, 502; Russ. 65, 6, 72, 3; *Chaplin* v. *Rogers*, 1 East, 192; *Harmon* v. *Anderson*, 2 Camp. 243; *Hurry* v. *Manyles*, 1 id. 452; *Hollingsworth* v. *Napeer*, 3 Caines, 182, 2d ed. and note at p. 184; *Bentall* v. *Burn*, 3 B. & C. 423; *Carter* v. *Williams*, 19 Pick. 1.) The sale being completely executed, the purchaser and owner, not the seller, should stand the loss. I think the report of the referee should be set aside.

McKissock, J., concurred.

Report set aside.

Sanger et al. v. Waterbury et al.

(116 New York, 371.—1889.)

Action of replevin to recover 238 bags of coffee.

It was alleged and admitted that on or about July 22, 1885, the plaintiffs sold to the defendants, J. K. Huston & Co., of Philadelphia, at 60 and 90 days, the following specified bags of coffee:

"89	bags,	marked	No. 6,	H. L. B. & Co.,	D. B. & Co.	
32	"	"	" 8,	"	"	
14	"	"	" 10,	"	"	
29	"	"	" 12,	"	"	
68	"	"	" 14,	"	"	
6	"	"	" 16,	"	"	"

On July 6, 1885, plaintiffs bought of Boulton, Bliss & Dallett 605 bags of coffee, which at that time were on store with E. B. Bartlett & Co. On the 24th of July, J. K. Huston & Co. borrowed $2,300 from the defendants Waterbury & Force, and transferred the coffee to them as security. On the 27th of July, said firm made a general assignment for the benefit of creditors. The coffee was in the warehouse of E. B. Bartlett & Co.; had been there since its purchase by the plaintiffs, and up to this time had not been weighed.

PARKER, J. The appellant contends that the title to the coffee in controversy did not pass to J. K. Huston & Co., and that, therefore, the transfer to Waterbury & Force did not vest in them the title or the possession. The sale is admitted. But as the coffee had to be weighed in order to ascertain the amount to be paid to plaintiffs, it is insisted that the title remained in the plaintiffs. In aid of this contention is invoked the rule that where something remains to be done by the seller to ascertain the identity, quantity or quality of the article sold, or to put it in the condition which the contract requires, the title remains in the vendor until the condition be complied with. The appellant cites a number of authorities which he urges so apply this rule as to make it applicable to the case here presented. It is said in *Groat et al.* v. *Gile*, 51 N. Y. 451, that "this rule has reference to a sale, not of *specific* property clearly ascertained, but of such as is to be separated from a larger quantity, and is necessary to be identified before it is susceptible of delivery. The rule or principle does not apply where the number of the particular articles sold is to be ascertained for the sole purpose of determining the total value thereof at certain specified rates or a designated fixed price." This distinction is recognized and enforced in *Crofoot* v. *Bennett*, 2 N. Y. 258; *Kimberly* v. *Patchin*, 19 N. Y. 330; *Bradley* v. *Wheeler*, 44 id. 495. In *Crofoot* v. *Bennett*, *supra*, the court say: "If the goods sold are clearly identified, then, although it may be necessary to number, weigh or measure them, in order to ascertain what would be the price of the whole at a rate agreed upon between the parties, the title will pass." This expression of the court is cited with approval in *Burrows* v. *Whitaker*, 71 N. Y. 291, in which case, after a full discussion of the authorities, the court approved the rule as laid down in *Groat* v. *Gile*, *supra*.

Now, applying that rule to the facts in this case, nothing remained to be done in order to identify the goods sold, because while out of a larger lot two hundred and thirty-eight bags of coffee were disposed of, nevertheless, as appears from the complaint and the testimony adduced, the bags were so marked that there was no difficulty about identifying the particular bags sold. There remained, therefore, nothing to be done except to weigh the coffee for the purpose of ascertaining the purchase-price. For whether the two hundred and thirty-eight bags of coffee should prove to weigh more or less than the parties anticipated was not of any consequence. Whatever should prove to be for that number of pounds, J. K. Huston & Co. had agreed to pay.

This case, therefore, does not come within the rule contended for by the appellant, but instead is governed by the principle enunciated in *Groat* v. *Gile*.

Having reached the conclusion that the title and the possession passed to J. K. Huston & Co., it becomes unnecessary to consider any of the other questions discussed, for the plaintiff is without title upon which to found the right to maintain an action.

The judgment appealed from should be affirmed.

All concur.

Judgment affirmed.

HAWES ET AL. v. WATSON ET AL.

(2 Barnewall & Cresswell, 540.—1824.)

TROVER for a quantity of tallow. Plea, not guilty.

On September 25, 1823, purchased of Moberly & Bell 300 casks of tallow at 40 s. per cwt., and, on September 27, Moberly & Bell sent plaintiffs the following transfer note, signed by defendants, who were wharfingers, in part execution of their contract:

"Messrs. J. & B. Hawes, We have this day transferred to your account (by virtue of an order from Messrs. Moberly and Bell), 100 casks tallow, ex Matilda, with charges from October 10, 1823. H. & M. 100 casks."

Plaintiffs gave M. & B. their acceptance for £ 2,880, the

price of the tallow, which was duly paid, and afterwards sold 21 cases of this tallow, which defendants delivered, pursuant to their order. On October 11, M. & B. stopped payment, and three days later defendants received notice from Raikes & Co., original vendors of the tallow, not to deliver the remaining casks to M. & B., or their order, and defendants obeyed the request, although plaintiffs demanded delivery. On part of defendants it was proved that M. & B., on September 26, had purchased of Raikes & Co. 100 casks of tallow (the same that were afterwards sold to plaintiffs) landed ex Matilda, at £ 2, 1 s. per cwt., to be paid for in money at 2½ per cent discount and 14 days for delivery; and on the same day Raikes & Co. gave a written order on defendants to weigh, deliver, transfer, or rehouse the tallow. M. & B. had not paid for the same, nor had it been weighed subsequently to this order. Defendants contended that they were not bound to deliver to plaintiffs the remaining 79 casks of tallow, inasmuch as Raikes & Co. had as between them and M. & B. a right to stop them in transit, the delivery to M. & B. not being perfect, because the tallow had not been weighed. The trial justice was, however, of the opinion, that whatever the question might be as between buyer and seller, the defendants having, by their note of September 27, acknowledged that they held the tallow on account of plaintiffs, could not now dispute their title; and plaintiffs had verdict.

HOLROYD, J. I think that the note given by the defendant makes an end of the present question. When that note was given, the tallow became the property of the plaintiffs, and is to be considered from that time as kept by the defendants as the agents of the plaintiffs, and the latter were to be liable from the 10th of October for all charges. This case is very different from that of *Hanson* v. *Meyer*. There, there was a sale of all the vendor's starch (the quantity not being ascertained,) at £ 6 per cwt. The order was to weigh and deliver all the vendor's starch, and a part having been weighed and delivered, but not the residue, the main question before the Court was, whether the weighing and delivery of part did or did not in point of law operate as a transfer of the property as to the whole. The Court held, rightly, that it did not, because there the price of the whole which was to be paid for by bills

could not be ascertained before it was weighed. The delivery of part, therefore, was not a delivery of the whole, but the order was complied with only as to the part which was weighed and delivered, and the property in the residue remained unchanged until something further was done. It was not a delivery of part for the whole, and therefore it did not operate in law as a delivery of the whole so as to divest the vendor of his right to stop *in transitu;* but here, the wharfingers upon the receipt of the order directing them to weigh and deliver, sent an acknowledgment that they, the wharfingers, had transferred the goods to the vendees, and that they would be considered as subject to charges from a certain period. I think, therefore, that the wharfingers then held the tallow as the goods of the plaintiffs and as their agents, although there was not any actual weighing of them; and that the plaintiffs were then in possession by the defendants as their agents, they having acknowledged themselves as such by their note. For these reasons I am of opinion that the plaintiffs are entitled to recover.

BEST, J. I am also of opinion, that the acknowledgment which has been given in evidence puts an end to all question in this case. The very point has already been decided in the case of *Harman* v. *Anderson*, 2 Campb. 243. There the wharfinger had transferred the goods to the name of the vendee, and actually debited him with warehouse rent, but he having become insolvent, the sellers gave notice to the wharfingers to retain the goods; and upon an action of trover being brought against the wharfingers by the assignees of the vendee, it was contended that the sellers' right to stop *in transitu* continued; but Lord Ellenborough said, "that the goods having been transferred into the name of the purchaser, it would shake the best established principles, still to allow a stoppage *in transitu.* From that moment the defendants became trustees for the purchaser, and there was an executed delivery, as much as if the goods had been delivered into his own hands. The payment of rent in these cases is a circumstance to show on whose account the goods are held; the transfer in the books being of itself decisive." . . . It appears to me too, that if we consider the principle upon which the right of stoppage *in transitu* is founded, it cannot extend to such a case as the present. The vendee has the legal right to the goods the moment the contract is exe-

cuted, but there still exists in the vendor an equitable right to stop them *in transitu*, which he may exercise at any time before the goods get actually into the possession of the vendee, provided the exercise of that right does not interfere with the rights of third persons. Now it appears to me impossible, that it can be exercised in this case without disturbing the rights of third persons, for the property has not only been transferred to the purchaser in the books of the wharfingers, but there has been an acknowledgment by them, that they hold it for the purchaser, who has paid the price of it. It has been said that there has been no change of property. If there has not, I do not see how there can be any until the tallow is actually melted down and converted into candles. If the argument on the part of the defendants be valid, the vendor, if he is not fully paid, has a right, if the goods are not weighed, to stop *in transitu*, even though they have passed through the hands of a hundred different purchasers, and been paid for by all except the first. It appears to me, that we should disturb an established principle if we held that this could be done in such a case as the present. I think the right of stoppage *in transitu* is an equitable right to be exercised by the vendor, only when it can be done without disturbing the rights of third persons. Here, that cannot be done, and therefore I think that Raikes and Co. had not any right to stop *in transitu*, and that the plaintiffs are therefore entitled to recover.

(Opinions by ABBOTT, C. J., and BAYLEY, J., omitted.)

SIMMONS v. SWIFT.

(5 Barnewall & Cresswell, 857.—1826.)

Indebitatus assumpsit for bark sold and delivered, the usual money counts, and a count upon an account stated. Verdict for plaintiff for £106, 3 s. 8 d., subject to the opinion of this court upon the following case:

Plaintiff and defendant were dealers in timber and bark. On October 23, 1824, the following agreement for the sale of a quantity of oak bark was signed by plaintiff and defendant:

"I have this day sold the bark stacked at *Redbrook*, at £9, 5s. per ton of twenty-one hundred-weight, to *Hezekiah Swift*, which he agrees to take, and pay for it on the 30th of *November*."

It was afterwards orally agreed between the parties that *William Simmons*, a brother of plaintiff, should see the bark weighed on the part of the plaintiff, and that *James Diggett* should see it weighed on the part of the defendant. Within five days after the signing of the agreement, defendant sent several of his barges and servants to *Redbrook*, weighed 8 tons and 14 cwt. according to agreement, and took same away. Defendant did not at any time take away the remainder of the bark, nor was it weighed. Towards the latter end of *November* there was an extraordinary flood, which overflowed the banks of the river *Wye*, and rose to the height of five feet around the remainder of the stack of bark, and did it very considerable injury. There was sufficient time for defendant to have removed the whole of the bark before the flood happened.

On December 4, 1824, defendant paid for the bark which had been removed, but refused to pay for the bark which had been left standing at *Redbrook*.

BAYLEY, J. Two questions are involved in this case: first, whether the property in the bark was vested in the defendant, so as to throw all risks upon him; secondly, whether there had been such a delivery of the bark as would support this form of action. It is not, perhaps, necessary to give any opinion upon the first point, but I think it right to do so, as it is most satisfactory to determine the case upon the main ground taken in argument. I think that the property did not vest in the defendant so as to make him liable to bear the loss which has occurred. Generally speaking, where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, the property passes immediately, so as to cast upon the purchaser all future risk, if nothing further remains to be done to the goods; although he cannot take them away without paying the price. If anything remains to be done on the part of the seller, until that is done the property is not changed. In *Rugg* v. *Minett*, 11 East, 216, and *Wallace* v. *Breeds*, 13 East, 522, the thing which remained to be done was to vary the nature or quantity of the commodity before delivery; that was to be done by the seller. In other cases the thing sold was to

be separated from a larger quantity of the same commodity. This case was different; the subject-matter of the sale was clearly ascertained. The defendant agreed to buy the bark stacked at *Redbrook*, meaning, of course, *all* the bark stacked there; but it was to be paid for at a certain price *per ton*. The bargain does not specify the mode in which the weight was to be ascertained, but it was necessary that it should be ascertained before the price could be calculated, and the concurrence of the seller in the act of weighing was necessary. He might insist upon keeping possession until the bark had been weighed. If he was anxious to get rid of the liability to accidental loss, he might give notice to the buyer that he should at a certain time weigh the bark, but until that act was done it remained at his risk. In *Hanson* v. *Meyer*, 6 East, 614, weighing was the only thing that remained to be done; there was not any express stipulation in the contract that the starch (the subject-matter of that contract) should be weighed; that was introduced in the delivery order, but the nature of the contract made it necessary. So here the contract made weighing necessary, for without that, the price could not be ascertained. Suppose the plaintiff had declared specially upon this contract, he must have alleged and proved that he sold the bark at a certain sum per ton, that it weighed so many tons, and that the price in the whole amounted to such a certain sum. The case of *Hanson* v. *Meyer* differs from this in one particular; viz., that the assignees of the vendee who had become bankrupt were seeking to recover the goods sold; but the language of Lord Ellenborough as to the necessity of weighing in order to ascertain the price before the property could be changed, is applicable to the present case, and decides it. I therefore think that the bark which remained unweighed at the time of the loss was at the risk of the seller; and even if the property had vested in the defendant, I should have thought that it had not been delivered, and consequently that the price could not be recovered on a count for goods sold and delivered.

LITTLEDALE, J. I entertain some doubt whether the property did not pass by this contract; and that doubt, as it seems to me, is not inconsistent with the decision in *Hanson* v. *Meyer*. The question there was, whether the assignees of the purchaser had a right to call for a delivery of the goods sold. Lord

Ellenborough said, payment of the price and the weighing of the goods necessarily preceded the *absolute* vesting of the property; which expression I take to have been used with reference to the then question, viz., whether the property had so vested in the purchaser as to entitle his assignees to claim the delivery. So in this case, although the property might vest in the purchaser, it would not follow that he could enforce a delivery until the weight of the bark had been ascertained, and the price paid. Here there was not a delivery in fact, nor was the delivery of part a constructive delivery of the whole. This differs from the cases of lien or stoppage *in transitu*, in which it may be considered that a delivery of part is in the nature of a waiver of the lien, or right to stop *in transitu*. I think further, that an action for goods bargained and sold would not lie merely because the property passed. The mere bargain would not suffice, because no specific price was fixed; nor could the plaintiff recover on a *quantum valebat*, for the contract was to pay by weight; and, therefore, until the commodity was weighed there would be nothing to guide the jury in the amount of damages to be given. The seller was at all events bound to offer to weigh the bark, but he never did so. For these reasons I think he cannot recover.

Postea to the defendant.

(Opinion by HOLROYD, J., omitted.)

KEIN ET AL. v. TUPPER ET AL.

(52 New York, 550.—1873.)

ACTION to recover the purchase price of seventy bales of cotton.

The General Term of the Superior Court of the city of New York reversed judgment in favor of plaintiffs, who bring this appeal.

CHURCH, Ch. J. It is conceded that the loss occasioned by the fire must fall upon the party who, at the time, had the legal title to the cotton; and such is the well settled rule. (8 N. Y. 291.)

The contract of sale and purchase did not pass the title. When anything remains to be done by the seller to ascertain the identity, quantity or quality of the property, no title passes. (5 Den. 379; 25 N. Y. 525, and cases there cited.)

Assuming that this was a sale of a quantity of specific cotton, which I think we may do, and which is the most favorable view for the plaintiffs, yet, as the cotton was to be weighed by the vendors, to ascertain the quantity, and sampled by both parties to ascertain the quality, no title would pass until these acts were done.

The contract was for the sale of 119 bales of cotton, specifically marked at $31\frac{1}{4}$ cents a pound, payable in cash on delivery. The cotton was to be weighed, and samples taken and compared with the original samples before it was ready for delivery. It is claimed by the plaintiffs that seventy of the 119 bales were delivered to and accepted by the defendants, forty-two of which were burned, for which the plaintiffs recovered at the circuit; and this presents the important question in the case. The order upon the warehouse for the cotton contained a direction to re-store the cotton for the defendants. This indorsement was made by the broker's clerk, and there was some conflict in the evidence whether the defendants authorized it; but we must assume that the jury found that they did, and also that the broker, who acted for both parties, had authority to accept a delivery for the defendants.

On the fifteenth of July seventy bales of the cotton were weighed, and samples taken out, and the bales put back in the warehouse; the order, with the indorsement containing the direction to re-store, having been delivered to the warehouseman. Further progress was suspended until next day for want of time, and on that night the fire occurred.

The question was presented on the trial, in various forms, that the delivery was not complete as to any part of the cotton; but the court held and ruled that if the jury found that the direction to restore was given by the defendants, and the broker was authorized to receive a delivery of the cotton for the defendants, then, that, as a matter of law, what took place in weighing and sampling the seventy bales amounted to a delivery of that quantity. In this I think the learned judge erred. If the broker had full authority, and that authority was conferred upon Bolton, the sampler, it was an authority to

receive one hundred and nineteen bales, and not seventy, or forty-two, or any other number. Neither of them had power to accept a less number, or waive the delivery of any part of the cotton purchased. (41 Barb. 446; Hill & Denio, supl't, 75.) But neither of them assumed to accept, unconditionally, seventy bales of the cotton. The acceptance, as far as it went, must be construed as conditional upon the delivery of the balance. The bales weighed were pronounced satisfactory, but were received subject to the delivery of the remainder. Besides, the sampling of the seventy bales was not complete until the samples taken out were compared with the original samples, which were at the broker's office. This was the business of the broker, who passed upon the quality upon such comparison. The sampler exercised his judgment as to the quality; but the final decision, it seems, was to be made by the broker.

Until this was done, the seventy bales were not ready for delivery even, much less delivered and accepted. The direction to re-store for the defendants, on the back of the order, must be construed to mean a direction to re-store when the cotton was all delivered. It did not apply to each bale as it was weighed, and in fact there was nothing done by the warehouseman to change the storage. All that can be predicated of the transaction of the fifteenth of July is, that the parties had commenced the performance of acts, as to some of the cotton, necessary to enable a delivery to be made, but had not completed them, and as to the balance of the cotton nothing had been done. I think the court should have held that there was no delivery of any part of the cotton.

But if there was a delivery of seventy bales, the action could not be sustained. The contract was entire, and the plaintiffs must prove performance to entitle them to recover. The defendants purchased one hundred and nineteen bales, to be paid for when delivered. Until the delivery of the whole quantity no action accrued to the plaintiffs.

While the destruction of the subject-matter of the contract, without fault of the plaintiffs, would relieve them from an action for damages for not performing the contract, yet it would not enable them to enforce a part performance against the defendants. (47 N. Y. 62.) The rule is well settled in this State that upon a contract for the delivery of a specified quantity of property, payment to be made on delivery, no action will

lie until the whole is delivered. (13 Wend. 259; 16 id. 632; 3 id. 112, 21 N. Y. 397; 2 id. 153.)

The English rule, that a recovery may be had for the portion delivered, if retained until after the time for full performance (as held in 7 B. & C. 387, and other cases), has never been adopted, but expressly repudiated by the courts of this State. (Id.) That rule rests upon no solid foundation, and in effect enables courts to alter the terms of contracts as made by parties.

The right of a vendor to demand the portion delivered in a case of the destruction of the remainder, so that full performance by the vendor is impossible, need not be considered, because in this case the plaintiffs had all the cotton claimed to have been delivered, which was not destroyed.

A vendee may accept a delivery of a part of the property, and waive the delivery of the remainder, and this may be shown by circumstances, but in this case there is not the slightest circumstance tending to establish such acceptance and waiver. Both parties expected to perform the contract in full. The unfortunate accident prevented it before the title had passed from the vendors, and the misfortune is theirs.

The order granting a new trial must be affirmed, and judgment absolute ordered for the defendants.

All concur.

Order affirmed and judgment accordingly.

Downer v. Thompson.

(2 Hill, 137.—1841.)

Assumpsit for goods bargained and sold, and also for goods sold and delivered.

The defendant who resided at Hastings, Westchester county, on August 21, 1838, addressed an order to the plaintiff, who resided at Chittenango, Madison county, for 250 barrels of cement, to be forwarded as soon as practicable. On the 4th of September following, the plaintiff shipped on board a canal boat 260 barrels, which arrived at Hastings on the 17th of the same month, and were offered to the defendant. He objected, among other things, that there were more barrels than he had

ordered, and finally refused to receive any of the cement. The boatmen having it in charge proceeded to New York, and there stored it.

The defendant's counsel insisted at the trial that the evidence did not sustain either the count for goods bargained and sold, or that for goods sold and delivered. He therefore moved for a nonsuit, which was granted, and the plaintiff excepted. The latter now moved for a new trial on a bill of exceptions.

By the Court, COWEN, J. The difficulty of the plaintiff lies in his not having numerically complied with the order, which was for 250, not 260 barrels. Had he shipped the 250 barrels, no doubt the property would have passed, and the count for goods sold and delivered been well sustained; because a delivery to the carrier for the account and risk of the consignee, is in law a delivery to the latter. (*Coxe* v. *Harden*, 4 East, 211.) But neither count was satisfied by the shipment or offer of the 250 barrels from among a larger number, the true amount being neither counted nor weighed out. The property yet remained to be specified, before the defendant could know what to call his own; and it is entirely settled, that where any act yet remains to be done by the vendor, such as weighing, measuring, or counting out of a common parcel, no property passes. Short of this, there is no sale, much less a delivery. (Long on Sales, 267, *et seq.*, ed. of 1839.) The exception at page 274, mentioned by the plaintiff's counsel, of a certain number of dollars sent in a barrel among others not intended for the consignee, is a different case. It went on the ground that the dollars were all of the same value, which cannot be predicated of the barrels in question. Beside, there is perhaps some difficulty in sustaining the exception without running foul of a strong current of cases.

We think no action will lie, unless it be a special assumpsit for not accepting the cement.

New trial denied.

BURROWS v. WHITAKER.

(71 New York, 291.—1877.)

ACTION to recover the purchase price of a quantity of lumber. Plaintiff had judgment below, which was affirmed by the General Term of the Supreme Court.

MILLER, J. The most important question to be determined in this case relates to the single point whether there was a delivery of the lumber in dispute to the defendant. By the contract, which was entered into in the spring of 1872, the defendant was to pay the price agreed upon for all the good and culled lumber which the plaintiff should deliver at Travis' Eddy, on the bank of the Delaware river, prior to the first rafting freshet in the spring of 1873. The delivery was commenced in the early part of December, continued until the middle of January, or a little later, when a freshet occurred, which swept away the lumber, to recover the value of which this action is brought, and which constituted a portion of the entire lumber drawn and placed on the bank. At this time, all the lumber had not been drawn, and the defendant had not commenced rafting, or seen or handled the same, nor had it been counted or estimated, although a man, furnished by the defendant, had assisted in unloading and in culling and piling the lumber.

The question whether there was a valid delivery and acceptance of the lumber washed away by the freshet, and title to the same conferred upon the defendant, must be determined by the testimony relating to the contract. The plaintiff swears that he was to deliver what lumber he could, at prices which were fixed, on the bank at Travis' Eddy, on the Delaware river, and that the defendant agreed to buy the same, and to furnish a man to cull and pile the lumber. He said he did not want the culls in, as it would hinder him about rafting, and he would cull and pile it, so as to have it ready to raft; and it was agreed that it should be counted on the bank or estimated in the raft. The defendant's version of the contract is, that he was to take such lumber as plaintiff could get on the bank at rafting time, at which period it was to be counted on the bank; or, if estimated, to be done when rafted, and he denies that he agreed

to have a man to cull and pile the lumber. The evidence is somewhat contradictory, and what were the exact terms of the contract presented a question of fact for the determination of the jury. If the plaintiff's testimony was true, then the contract was for a delivery on the bank, to be piled and culled by defendant's man. It was not stated that this person should have direct authority to receive the lumber formally, on behalf of the defendant; but, as he had something to do with it in carrying the contract into effect, it is, perhaps, not an unreasonable presumption that he was authorized to receive the lumber. He could not well perform the work which he was assigned to do, without some act of ownership or control, on behalf of the defendant, over the lumber after it was left at the place of deposit which had been provided for under the contract. It further appears, as a circumstance showing the defendant's understanding of the contract, and that he considered himself the owner of the lumber upon its delivery; that, at a subsequent time, without consulting the plaintiff, and without plaintiff's knowledge, and before the lumber had been counted or the quantity estimated, he made up three rafts of the lumber, which was not washed away, and took them down the river, thus assuming that he was the owner and that the title was in him. There were also declarations of the defendant tending to show that such was his construction of the contract. In view of all the evidence and the circumstances connected with the transaction, it was, I think, a fair question for the jury to decide what the actual contract was, and whether the delivery of the lumber was perfect and complete.

The claim of the defendant that there was no sale, but an executory contract to manufacture and deliver the lumber, and that title to a part of the lumber did not pass until the whole was drawn, is not, I think, well founded. The lumber was to be drawn at different times, in quantities, and the nature of the contract is at war with the idea that it was an entirety. It contained no provision from which such an interpretation can be inferred, and the circumstances all tend to a different conclusion. The authorities relied upon to uphold the position contended for are not in point. In *Kein* v. *Tupper*, 52 N. Y. 550, the contract was for the sale and delivery of a certain number of bales of cotton, to be paid for on delivery, and it was held that no action could lie until the whole was delivered.

The delivery of the entire number of bales was a condition precedent of payment, and hence until their delivery the right of action was not perfect.

In *Andrews* v. *Durant*, 11 N. Y. 35, there was a contract for the building of a vessel, which was to be paid for during the progress of the work, and no property vested in the person for whom it was to be built, until it was fully completed. These decisions have no application to a case where the property is to be delivered at different times, and received and accepted, as a delivery was made from time to time, as was the case here. Even if it may be doubted whether the contract contemplated that title to the lumber should not pass, until the whole of the lumber was delivered, it was at least a question as to the intention of the parties to be determined from the evidence. (*Terry* v. *Wheeler*, 25 N. Y. 520; *Bacon* v. *Gilman*, 57 id. 656; *Schindler* v. *Houston*, 1 Coms. 261, 265, 269.) And this question was one for the jury to decide.

Upon the question argued by the defendant's counsel, whether a complete and final culling of all the lumber was required, I think no serious difficulty arises. The general rule is well settled, that upon a sale of chattels, title does not pass so long as anything remains to be done before delivery, to ascertain the identity, quality, quantity, or price of the property, if by a fair interpretation of the contract, any of these acts are to be done before or at the time of such delivery. (See *Terry* v. *Wheeler*, *supra*; *Evans* v. *Harris*, 19 Barb. 416.)

In the case at bar, there is strong ground for claiming that the fair interpretation of the contract is, that title should pass upon the delivery of the lumber upon the bank, and it being thus delivered at a place designated by the defendant, it passed into his possession, and as some of the testimony shows, was there piled and culled by an agent in the defendant's employment. The delivery was thus complete, and the culling of the entire quantity, or even the counting or measurement of the same, was not an essential element to the validity of the contract. This condition was not a condition precedent, upon which the execution of the contract depended. This case comes within the rule which holds, that although something remains to be done, yet if it clearly appears to be the intention of the parties, that the property shall be deemed to be delivered and the title pass, it shall be so held. (*Olyphant* v. *Baker*, 5

Denio, 379; *Dexter* v. *Bevins*, 42 Barb. 573; *Keeler* v. *Vandervere*, 5 Laws. 313.)

In *Crofoot v. Bennett*, 2 Coms. 258, the owner of a brickyard sold to the defendant a quantity of brick in a kiln, delivered to him possession of the yard, and executed to the plaintiff a bill of sale of all the bricks in the kiln; and it was held that the defendant was entitled to take the quantity named, although they were not counted out, marked or separated from the residue. It is said, in the opinion, "if the goods sold are clearly identified, then, although it may be necessary to number, weigh or measure them, in order to ascertain what would be the price of the whole at a rate agreed upon between the parties, the title will pass."

It was also laid down, that the distinction in all these cases does not depend so much upon what is done as upon the object to be effected. If it be specification, the property is not changed; if merely to ascertain the total value at designated rates, the change of title is effected. It is very plain that the object of the culling and counting, or measuring, was merely as a means of ascertaining the total value, at the rates agreed upon; and hence the title became changed, without the entire lumber being culled, counted or measured.

This doctrine is familiar, and sustained by numerous authorities. (*Russel* v. *Carrington*, 42 N. Y. 118; *Macomber* v. *Parker*, 13 Pick. 175; *Riddle* v. *Varnum*, 20 id. 282; *Tyler* v. *Strang*, 21 Barb. 198; *Dexter* v. *Bevins*, *supra*.)

But, independent of the rule referred to, the fair construction of the contract is, according to the ordinary rules of interpretation, that the defendant agreed to take such lumber as was brought by the plaintiff and delivered on the bank; and when he did this, and the defendant thus became possessed of the property, he was the absolute owner, and the culling, counting or measuring was not essential to establish a delivery. The proof also shows that the whole was piled, and this was an act of ratification, which sanctioned and approved the delivery.

In regard to the question of acceptance by the defendant, no general act was required, and a delivery according to the terms of the contract vested the title in the purchaser. (*Hyde* v. *Lathrop*, 3 Keys, 597; *Dexter* v. *Bevins*, *supra*.)

The charge of the judge, leaving it for the jury to decide

whether it was the understanding between the parties, that a delivery on the bank was a complete performance for the purpose of the contract, and vesting the title in the defendant, was not liable to objection within the rules referred to. As we have seen, what was to be done after the delivery on the bank was not material, if the parties intended that the delivery there constituted a performance. The contract was then fulfilled; the lumber under the control, and in possession of the defendant for the purpose of being rafted, and he became the absolute owner of the same.

The various rulings in regard to the evidence disclose no error, and the judgment must be affirmed, with costs.

All concur.

Judgment affirmed.

HATCH v. BAYLEY.

(12 Cushing, 27.—1853.)

SHAW, C. J. This is an action of replevin for twenty-three barrels of flour, and the single question is, whether it was the property of the plaintiff. It was attached by the defendant as the property of J. B. Hoogs. It appears by the case, that Hoogs, previously to his departure for Albany to purchase flour, promised the plaintiff, in consideration of a loan of his note to raise money upon, to sell the plaintiff two hundred barrels of his purchase, at prices fixed. At Albany, Hoogs purchased and put on board the railroad cars for Boston, one hundred barrels of one brand and twenty-three of another, to be forwarded to Boston, taking the usual receipt or way-bill, making the said flour deliverable to himself. The flour was forwarded, and Hoogs inclosed to the plaintiff a written order, making the flour deliverable to him. This the plaintiff notified to the agent of the railroad company, and at the same time paid the freight. The agent took the plaintiff's directions as to the mode and place of delivery; the agent marked the car containing it, and directed the car to be run on a side-track to a point near the plaintiff's warehouse, for the purpose of being there delivered; but the flour was not taken out of the car, nor had the car been

actually removed. All this occurred before the attachment. There was no evidence of any bill of sale, or other conveyance of said flour, from Hoogs to the plaintiff.

The court, in reference to this evidence, which was not controverted, instructed the jury, that if they should find that the said car, containing said twenty-three barrels of flour, was, prior to said attachment, marked as aforesaid by the clerk of the corporation, in the presence of said plaintiff, who then gave the foregoing direction in regard to its marking and disposal, it was a sufficient delivery; and that it was not necessary that the corporation should open the car, separate the twenty-three barrels of flour from the rest of the merchandise, or run the said car on the side-track, or do any other act to complete the delivery.

These directions, we think, were correct. No bill of sale or other contract in writing was necessary to effect an actual sale and transfer of property; the verbal contract made by the said Hoogs, in Boston, to sell the plaintiff two hundred barrels of flour, though being an executory contract, could not be enforced by law, by reason of the statute of frauds, without writing, yet when it was actually executed, the property passed to the vendee.

Then, was it executed by a sufficient delivery? Putting the flour into the cars at Albany, was not a delivery, because the way-bill made the flour deliverable to Hoogs himself. But the right to receive the property on arrival was assignable, and when Hoogs ordered it delivered to the plaintiff, and the company, by their authorized agent, acknowledged the plaintiff's right, took his directions as to the delivery, then marked the car containing it, with directions to the subordinates of the company so to deliver the merchandise, it was a good constructive delivery, pursuant to the agreement to sell, and vested the property in the vendee.

In general, that act, which changes the control and dominion of property, after an agreement for a sale, that which supersedes the power and control of the vendor and transfers it to the vendee, is a good delivery to pass the property; such as a delivery of the key of the warehouse, *Wilkes* v. *Ferris*, 5 Johns. 335; *Packard* v. *Dunsmore*, 11 Cush. 282; transfer of a warehouse-keeper's receipt, notified and assented to by the warehouse-keeper, *Tuxworth* v. *Moore*, 9 Pick. 347; removal of a horse from vendor's sale-stable to his livery-stable, to keep for the vendee, *Elmore* v. *Stone*, 1 Taunt. 458; transfer of dock war-

rants for goods in the London dock warehouses, *Zwinger* v. *Samuda*, 7 Taunt. 265.

In all these cases, the ground is, that the same person who was the agent of the vendor to keep, becomes the agent of the vendee to keep; and the possession of the agent is the possession of the principal. *Gardner* v. *Howland*, 2 Pick. 559; *Gibson* v. *Stevens*, 8 How. 384.

And we think the judge was right in directing the jury as he did. What amounts to a delivery of goods sold, when the facts are found, is a question of law. The court left it to the jury upon the evidence, to decide whether the facts were true, and directed them hypothetically, that if such facts were true, they constituted a sufficient delivery. This was no encroachment on the province of the jury; it left them at liberty to weigh the evidence, to draw their own inferences, and decide on the facts; and the judge did what it was his province to do, directed them in matter of law, to enable them to return a general verdict.

* * * * * * * *

Exceptions overruled.

LINCOLN v. GALLAGHER.

(79 Maine, 189.—1887.)

ACTION for damages for breach of contract for the purchase and sale of a vessel. Verdict for plaintiff, to which defendant excepted.

PETERS, C. J. It was said in *Howard* v. *Miner*, 20 Maine, 330, that on a contract for the delivery of specific articles which are ponderous or cumbrous, when it is not designated in the contract, and there is nothing in the condition and situation of the parties to determine the place of delivery, it is the privilege of the creditor to name a reasonable and suitable one; that the debtor should request the creditor to select the place, and if the creditor fails to do so, the debtor may appoint the place.

In the case at bar a vessel was purchased on the eastern

coast somewhere, to be delivered to the buyer in Portland. Had the defendant provided a suitable place at some dock or wharf, which could have been reached by the use of reasonable exertion, the delivery should have been made there. The purchaser, after notice, failing to provide a place, we think the seller would be justified in tendering a delivery at safe anchorage in the harbor. He should not be required to go to special expenses to himself to obtain a place at the wharf or upon the shore.

By the bill of exceptions, examined with the judge's charge, we find that a controversy arose between the parties over the requirement of the purchaser that the seller should go to the expense himself of placing the vessel in a dry dock in order that the purchaser could there examine her. There was some reason to suspect that the vessel had been ashore on her voyage to Portland, and the purchaser desired an inspection to see whether she had escaped injury or not.

There can be no doubt that, in offering delivery, the seller was under obligation to afford an opportunity to the purchaser to make the examination. But any expenses to be incurred thereby, beyond what would be necessary in putting the vessel in a proper place for delivery, would fall upon the buyer and not upon him. The seller was under no obligation to incur any unusual expense. He could not be called upon to place the vessel in a dry dock. He tenders the property as sound according to the agreement under which he acted. The buyer must accept or reject it at his risk. Benj. Sales, § 695; *Croninger* v. *Crocker*, 62 N. Y. 151.

Exceptions overruled.

WALTON, DANFORTH, EMERY, FOSTER, and HASKELL, JJ., concurred.

ANDREWS ET AL. v. DURANT ET AL.

(11 New York, 35.—1854.)

THE plaintiffs brought an action in the nature of trover for a barge in an unfinished state, which they alleged the defendants had converted to their own use. The defendants denied the allegations in the complaint, and set up title to the barge in themselves. The following facts appeared on the trial. On April 24, 1849, the defendants entered into a contract, in writing, with William H. Bridger & Co., ship-builders, by which the latter agreed "to build" for the defendants, for the sum of $5,000, a barge of certain dimensions and with a certain size and description of timbers, etc., which were particularly specified, except the *rail*, which was to be "according to direction of superintendent." The further provisions of the contract were as follows: "All the materials to be furnished by the builder, and all to be of the first quality, and the work subject to the superintendent, who shall have the privilege of rejecting any timber he may think is not suitable, and object to any work not done in a workmanlike manner. The boat to be furnished complete, and ready for the ship-chandler according to the above specification on the first day of August next, and delivered to Durant, Lathrop & Co., [the defendants] at Kingston. In case the barge is not complete by the time specified above, or within ten days of that time, W. H. Bridger & Co. agree to forfeit $250 for every week's delay. *Payment:* The said $5,000 to be paid as follows, viz., $1,000 when keel is laid, $1,000 when frame is up, $1,000 when planked and calked, and $2,000 when completed and delivered."

Bridger and Co. proceeded in the construction of the barge until August 4, 1849, when, having stopped payment, they assigned the unfinished vessel, with their other property, to the plaintiffs as trustees for the benefit of their creditors, according to certain classes of preference. The barge had been so far advanced in its construction as to be planked, and the defendants had paid the builders $3,000 according to the contract, when the builders failed. The defendants, having obtained possession of the barge, proposed to the plaintiffs to finish it, and offered in that event to pay them the balance of the con-

tract price, but this was declined; and the plaintiffs demanded the barge of the defendants, who would not give it up. The defendants then procured it to be completed on their own account, at an expense of $700. The person who acted as superintendent in the building of the barge was sworn, and testified that he was employed exclusively by the defendants and was paid by them.

Judgment was rendered in favor of the defendants, and the plaintiffs excepted: it was affirmed at the general term. The plaintiffs appealed to this court.

DENIO, J. In general a contract for the building of a vessel or other thing not yet *in esse*, does not vest any property in the party for whom it is agreed to be constructed during the progress of the work, nor until it is finished and delivered, or at least ready for delivery and approved by such party. All the authorities agree in this. (*Towers* v. *Osborne*, 1 Stra. 506; *Mucklow* v. *Mangles*, 1 Taunt. 318; *Johnson* v. *Hunt*, 11 Wend. 139; *Crookshank* v. *Burrill*, 18 John. 58; *Sewall* v. *Fitch*, 8 Cow. 215; *Mixer* v. *Howarth*, 21 Pick. 205.) And the law is the same though it be agreed that payment shall be made to the builder during the progress of the work, and such payments are made accordingly. In *Mucklow* v. *Mangles*, which arose out of a contract for building a barge, the whole price was paid in advance, the vessel was built, and the name of the person who contracted for it was painted on the stern, yet it was held that the title remained in the builder. In *Merritt* v. *Johnson*, 7 John. 473, where a sloop was agreed to be built and one-third of the price was to be paid when one-third of the work was done, two-thirds when two-thirds were done, and the balance when it was completed, and before it was finished it was sold on execution against the builder after more than a third had been done and more than that proportion of the price had been paid, the court decided that the vessel was the property of the builder, and not of the person who engaged it to be constructed.

Where during the course of the transaction the vessel or other thing agreed to be built is identified and appropriated so that the mechanic would be bound to complete and deliver that particular thing, and could not without violating his contract substitute another similar article though otherwise corresponding with the agreement, there would seem to be more reason

for holding that the property was transferred; still it has never been held that this was enough to pass the title. In *Laidler* v. *Burlinson*, 2 Mees. & Welsb. 602, the vessel was about one-third built when the contract was made. The builder and owners agreed to finish that particular vessel in a manner specially agreed upon for a price which was the equivalent for the finished vessel. Before it was completed the builder became bankrupt, and the possession passed into the hands of his assignee. The court of exchequer held the true construction of the contract to be that the title was to pass when the ship was completed and not before. The parties only agreed to buy a particular ship *when complete*, and although the builder could not comply with the contract by delivering another ship, still it was considered an executory contract merely. In *Atkinson* v. *Bell*, 8 Barn. & Cress. 277, the same principle was held in respect to a contract for making spinning machinery, and in *Clarke* v. *Spence*, 4 Adolph. & El. 448, which is the case principally relied on by the defendants, it was admitted by the court that the appropriation of the particular ship to the contract, then in question, by the approval of the materials and labor by the superintendent, did not of itself vest the property in the purchaser until the whole thing contracted for had been completed.

In the case before us, it cannot be denied but that the barge, as fast as its several parts were finished with the approval of the superintendent, became specifically appropriated to the fulfilment of this contract, so that Bridger & Co. could not have fulfilled their agreement with the defendants in any other way than by completing and delivering that identical boat. This results from the consideration that the superintendent could not be called upon to inspect and approve of the work and materials of another barge, after having performed that duty as to one; so that the contract would be broken up unless it applied itself to this vessel. But it is clear that this circumstance alone does not operate to transfer the title. The precise question in this case is whether the concurrence of both particulars—the payment of parts of the price at specified stages of the work, and the intervention of a superintendent to inspect and approve of the work and materials—produces a result which neither of them separately would effect. It is no doubt competent for the parties to agree when and upon what conditions the property in

the subject of such a contract shall vest in the prospective owner. The present question is therefore simply one of construction. The inquiry is whether the parties intended by the provisions which they have inserted in their contract, that as soon as the first payment had become payable and had been paid, the property in the unfinished barge should vest in the defendants, so that thereafter it should be at their risk as to casualties, and be liable for their debts, and pass to their representatives in case of their death. Such an agreement would be lawful if made, and the doubt only is whether the parties have so contracted.

The courts in England, under contracts in all material respects like this, have held that the title passed. In *Woods* v. *Russell*, 5 Barn. & Ald. 942, the question came before the court of king's bench, and Abbott, C. J., distinctly declared his opinion that the payment of the instalments under such a contract vested the property in the ship in the party for whom it was to have been constructed. But there was another feature in the case upon which it was finally decided. The builder had signed a certificate for the purpose of enabling the other party to procure the vessel to be registered in his name and it was so registered accordingly while it was yet unfinished and before the question arose. The court held that the legal effect of signing the certificate for the purpose of procuring the registry was, from the time the registry was complete, to vest the general property in the party contracting to have the ship built. This case was decided in 1822, and was the first announcement of the principle upon which the defendants' counsel rely in the English courts. The case of *Clarke* v. *Spence* was decided in 1836. It arose out of a contract for building a vessel, which contained both the features of superintendence and of payments according to specific stages of the work, as in *Woods* v. *Russell*, and as in the contract now before the court. The court of king's bench was clearly of opinion, that as fast as the different parts of the vessel were approved and added to the fabric they became appropriated to the purchaser *by way of contract*, and that when the last of them were so added and the vessel was thereby completed it vested in the purchaser. The court conceded that by the general rules of law, until the last of the necessary materials was added the thing contracted for was not in existence; and they said they have not been able to find any authority for

holding that while the article did not exist as a whole and was incomplete, the general property in such parts of it [as] had been from time to time constructed should vest in the purchaser, except what was said in the case of *Woods* v. *Russell;* and that was admitted to be a dictum merely, and not the point on which the case was decided. The court however decided upon the authority of that case, though with some hesitation, as they said, that the rights of the parties in the case before it, after the making of the first payment, were the same as if so much of the vessel as was then constructed had originally belonged to the party contracting for its construction and had been delivered by him to the builder to be added to and finished; and they said it would follow that every plank and article subsequently added would, as added, become the property of the party contracting with the builder. The dictum in *Woods* v. *Russell* was incidentally referred to as the law in *Atkinson* v. *Bell*, 8 Barn. & Cress. 277, and the doctrine there stated, and confirmed in *Clarke* v. *Spence*, was assumed to be correct in *Laidler* v. *Burlinson* before referred to. It has also been generally adopted by systematic writers in treatises published or revised since the decision of *Clarke* v. *Spence*, that case and *Woods* v. *Russell* being always referred to as the authority on which it rests. (Story on Sales, §§ 315, 316; Chit. on Cont. 378, 9; Abbott on Ship. 4, 5.)

It is scarcely necessary to say that the English cases since the revolution are not regarded as authority in our courts. Upon disputed doctrines of the common law they are entitled to respectful consideration; but where the question relates to the construction or effect of a written contract they have no greater weight than may be due to the reasons given in their support. Can it then be fairly collected from the provisions of this contract, that the title to the unfinished barge was to be transferred from the builder to the other party upon the making of the first payment, contrary to the principle well settled and generally understood that a contract for the construction of an article not in existence is executory until the thing is finished and ready for delivery? In the first place, I should say that so marked a circumstance would be stated in words of unequivocal import; and would not be left to rest upon construction, if a change of property was really intended. The provision for superintendence by the agent of the intended owner, though it serves to

identify and appropriate the article as soon as its construction is commenced, does not, as we have seen, work any change of property. Such would not ordinarily be the intention to be deduced from such a circumstance. Many of the materials of which a vessel is composed are ultimately covered so as to be concealed from the eye when it is finished; and as the safety of life and property is concerned in the soundness and strength of these materials, it is but a reasonable precaution to be taken by one who engages a vessel to be constructed, to ascertain as the work progresses that everything is staunch and durable; and such a provision, as it seems to me, does not tend to show a design that there shall be a change of property as fast as any materials or work are inspected and approved. It amounts only to an agreement that when the whole is completed the party will receive it in fulfilment of the contract. The provision for advances at particular stages of the work is a very usual one where an expensive undertaking is contracted for, and it only shows that the party advancing is willing thus to assist the artisan provided that he can see that the work is going on in good faith, so as to afford a reasonable prospect that he will realize the avails of his expenditure in a reasonable period. The argument for the defendants would be somewhat stronger if we could say that the amount to be advanced at the several stages mentioned was understood by the parties to be the price or equivalent for the labor and materials already expended. This by no means appears, but on the contrary there is strong reason to believe, that in this case a considerable portion of the price was to be at all times kept back in order to secure the speedy completion of the contract. When Bridger & Co. failed only three thousand dollars of the five thousand had been paid, and they would not be entitled to any more until the barge was finished, and yet it cost only seven hundred dollars to complete it. This renders it improbable that the parties could have intended the sale and purchase of so much as was done at the several stages of the work at which payments were to be made, if indeed such a contract were not in itself so much out of the course of the ordinary conduct of parties as not to be assumed without unequivocal language.

The decision in *Clarke* v. *Spence* is placed very much upon the idea, that parties may have contracted in reference to the doctrine announced in *Woods* v. *Russell*. That argument can

have no force here, but on the contrary the inference to be drawn from our own cases and particularly from *Merritt* v. *Johnson*, would be that the title remained in the builder under such a contract until the completion of the vessel.

The foregoing considerations have led me to the conclusion that the modern English rule is not founded upon sufficient reasons, and that it ought not to be followed. The judgment of the Supreme Court should therefore be reversed, and a new trial ordered.

Empire State Type Founding Co. v. Grant.

(114 New York, 40.—1889.)

Parker, J. In March, 1886, the plaintiff, by its president, agreed to sell to one Guy Tremelling two printing presses, with the necessary shafting, together with a quantity of type and other printers' supplies, for the sum of $1,100.95, payment to be made as follows: Five hundred dollars to be paid in cash, and a chattel mortgage, embracing all the property sold, to be given by Tremelling for the balance. The plaintiff at once commenced to put up the shafting, set the presses and deliver the type and other materials. When the work was about half done, the clerk of the plaintiff was sent to Tremelling to collect the cash agreed to be paid. Tremelling paid $250 and the plaintiff went on with the work of putting the presses in working order, transferring the type and other materials, in which work the plaintiff was engaged between fifteen and sixteen days. Immediately after the materials had been put in and work completed, the president of the plaintiff went to the office of Tremelling to receive the payment agreed upon, and learned that Tremelling had absconded. On the same day, or the day following, the defendant, as sheriff of the city and county of New York, under and by virtue of a warrant of attachment regularly issued against the property of Tremelling, levied upon the effects in question. The plaintiff thereupon commenced this action to recover possession of the property. At the close of the plaintiff's case, the defendant moved the court

to direct a verdict for the defendant. The plaintiff asked that the case be submitted to the jury. The court denied the plaintiff's request and directed a verdict for the defendant, the plaintiff duly excepting.

We think that the facts proven did not warrant the trial court in holding, as a matter of law, that the title to the property had passed from plaintiff to Tremelling, and, therefore, the disposition made of the case was error. It is too well settled to require the citation of authority, that where a sale of personal property is made upon condition that the stipulated price shall be paid upon delivery, title does not pass until payment made, unless the vendor waive the condition. Under such a contract, delivery and payment are simultaneous or concurrent acts by the seller and buyer; and although the articles may have been actually delivered into the possession of the vendee, the delivery is held to be conditional, and not absolute, provided the vendor has not by subsequent acts waived the condition of payment. If, then, the agreement between the plaintiff and Tremelling had provided, in express terms, that payment be made on delivery (no proof having been offered tending to show a subsequent waiver of such condition), it would have been the duty of the court to hold, as a matter of law, that the title to the chattels still remained in the plaintiff.

The agreement, however, did not provide, in express terms, that payment should be made on delivery. Neither did it provide that payment and delivery should not be concurrent. The rule in such case is that the intent of the parties must control. If it can be inferred from the acts of the parties and the circumstances surrounding the transaction that it was the intent that delivery and payment should be concurrent acts, the title will be deemed to have remained in the vendor until the condition of payment is complied with. (Benj. on Sales, [Am. ed.] § 330 and notes; *Leven* v. *Smith*, 1 Denio, 571; *Hammet* v. *Linneman*, 48 N. Y. 399; *Smith* v. *Lynes*, 5 id. 41; *Parker* v. *Baxter*, 86 id. 586; *Russell* v. *Minor*, 22 Wend. 659.)

The question of intent is one of fact, not of law. It is for the jury, not for the court to pass upon. (*Hall* v. *Stevens*, 40 Hun, 578; *Hammet* v. *Linneman*, 48 N. Y. 399.)

It appears that the defendants stipulated to pay for the materials sold, $500 in cash and give a chattel mortgage on all of the property for the balance; that while the materials were

being delivered, the plaintiff demanded and received $250 on account of cash payment; that, immediately after the plaintiff had performed his part of the contract, its president went to Tremelling's office to receive payment and found that he had absconded, and the next day the plaintiff's president asserted to the attaching creditor that he had not parted with the possession of the goods. These facts, together with all the circumstances surrounding the transaction under the authorities cited, should have been submitted to the jury, under proper instructions, to enable them to determine whether the title passed to Tremelling or remained in the plaintiff. It is suggested, in one of the opinions of the court below, that Tremelling had acquired an interest to the extent of $250 in the property, which was subject to sale under the attachment. We do not concur in that view. If it be determined that the title to the property remains in the plaintiff, the case falls within the established rule that where a vendor of chattels, when the period of performance arrives, is ready and offers to perform on his part, and the purchaser neglects and refuses to perform, for any reason, he cannot recover back the partial payments he has made. (*Monroe* v. *Reynolds & Upton*, 47 Barb. 574; *Humeston* v. *Cherry*, 23 Hun, 141.)

The judgment of the General Term and of the Circuit should be reversed and a new trial ordered, costs to abide the event.

All concur.

Judgment reversed.

HAGUE ET AL. v. PORTER.

(3 Hill, 141.—1842.)

ERROR to the New York C. P., to recover the value of one hundred lamps alleged to have been sold by the plaintiffs to the defendant.

On the 27th of August, 1840, the defendant, a merchant of the city of New York, agreed to take of the plaintiffs, who were engaged in business at Newark, N. J., two dozen side-lamps in one lot. These were paid for and delivered to the defendant. At the time of making this agreement and before the delivery

of the two dozen, which were wanted immediately, the defendant ordered one hundred more lamps of the same kind, which were to be made and delivered as soon as practicable. The price of the whole was agreed on at the rate of $13.00 per dozen. On the 4th of September following the defendant wrote to the plaintiffs suggesting an alteration that he wished to have made in the construction of the lamps in question. After being completed according to directions, they were boxed up and sent by a carman to the defendant's store. The defendant refusing to receive the lamps, they were left on the side-walk; and the present action was brought to recover the agreed price. The court below directed a nonsuit, on the ground that there was no proof of a *delivery* of the lamps. The plaintiffs excepted, and, after judgment, sued out a writ of error.

By the Court, COWEN, J. Here was no actual delivery and acceptance by the defendant below. The contract was executory, and he refused to receive. It was scarcely a case of goods bargained and sold. The count should, I apprehend, have been special, for refusing to accept. All the cases on this point were considered in *Atkinson* v. *Bell*, 2 Man. & Ryl. 292; 8 Barn. & Cress. 277, *S. C.*, and the subject entirely exhausted: indeed the case itself is directly against the plaintiff in error. The contract for the two dozen lamps was distinct, and the delivery of these bore no relation to the one hundred in question. (*Thompson* v. *Maceroni*, 3 Barn. & Cress. 1.)

The case of *Downer* v. *Thompson*, 2 Hill, 137, or rather the *dictum* cited from that case, went on the assumption that there had been a delivery to and acceptance by the carrier with the assent of the vendee. That is a constructive delivery to the vendee himself, and satisfies a count for goods sold and delivered, the same as a personal delivery to and acceptance by him. If he order goods to be sent by a carrier, though he do not name him, and they are sent accordingly, that is a delivery. (*Dutten* v. *Solomonson*, 3 Bos. & Pull. 582.) Such direction may certainly be implied from the course of trade; but I do not see here any direction so to send, either express or implied. The practice between Newark and New York is not shown. There was no dispute in the cases cited that the goods were to be sent by a carrier, nor that they were so sent pursuant to order.

Judgment affirmed.

KRULDER v. ELLISON ET AL.

(47 New York, 36.—1871.)

ACTION to recover the value of a barrel of shellac delivered to defendants, common carriers, and consigned to Newell & Turpin. The barrel was empty when it reached its destination, and was reshipped to the plaintiff. At the trial, the defendants requested the court to charge that delivery at the boat passed the title to Newell & Turpin, and that plaintiff was not entitled to recover. To the court's refusal so to charge, defendants excepted.

PECKHAM, J. Had the plaintiff, the vendor of the goods, the right to maintain an action for their loss? Here the evidence shows that Newell & Turpin, of Rochester, had ordered the goods from plaintiff, of New York city, to be sent to them "via canal, such as you sent last." Plaintiff sent them a bill by mail of the purchase, and shipped the goods "via canal," by defendant's boat. Plaintiffs also remitted to the purchasers a bill of sale of the goods.

The presumption of law is, that the consignee is the owner of the goods in the absence of any evidence on the subject, and is the proper party to sue, for their injury or loss. (*Sweet* v. *Barney*, 23 N. J. 235; *Price* v. *Powell*, 3 Comst. 322; *Everett* v. *Saltus*, 15 Wend. 474; Ang. on Carriers, § 497, and cases cited.)

There have been decisions qualifying this rule as to the proper party to sue, some holding, that an action might be maintained by the consignor, where he had made a special contract for the transportation.

In *Moore* v. *Wilson*, 1 Tr. R. 659, an action was sustained by the consignor against a carrier, where it appeared that the consignee had agreed with the plaintiff to pay for the transportation.

Buller, J., holding that the agreement was between the "consignor and the carrier, the former of whom was, by law, liable." One case only is referred to; this was in 1787, in a note (1 Atk. 248), where the Lord Chancellor declares the

rule to be the other way, and that such an action would not lie.

In *Joseph* v. *Knox*, 3 Camp. 320, where goods had been shipped by plaintiff, an agent of the owner, who resided abroad, to be forwarded to a given place, and the freight paid by the agent and consignor, a recovery was allowed by Lord Ellenborough, at *nisi prius*, on the ground of the special contract. This in 1812. So in *Davis* v. *James*, 5 Burr. 2680, a like rule was held where the consignor agreed to pay, and paid the carrier, in 1770. In *Dawes* v. *Peak*, 8 Durn. & E. 330, it was unanimously held, after full citation of authorities and consideration, that an action by the consignor would not lie for the loss of the goods, when they had been delivered to a particular carrier by order of the consignee, though he paid for booking the goods. Lord Kenyon, Ch. J., in delivering the opinion of the court, observed (K. B.): "This question must be governed by the consideration in whom the legal right was vested, for he is the person who has sustained the loss." The court held, that this booking was done as the agent of the consignee. This in 1799. In *Brower* v. *Hodgson*, 2 Camp. 36, a like decision at *nisi prius*, by Lord Ellenborough, where the goods were shipped by order, and on account of the consignee, as appeared by the bill of lading. So held, on the ground that the property was in the consignee, from the time of delivery, on board the vessel. This is 1809.

In *Dutton* v. *Solomonson*, 3 Bos. & Pul. 582, same doctrine. Lord Alvanley, Ch. J., expressed his surprise that the point should be questioned, as he said it appeared to him to be a proposition as well settled as any in the law, that if a tradesman order goods to be sent by a carrier, though he names no particular carrier, the moment the goods are delivered to the carrier it operates as a delivery to the purchaser. The whole property immediately vests in him; and he alone can bring an action for any injury done to them.

In 1803, in *Freeman* v. *Birch*, 1 Nev. & Man. 420, a laundress sent linen she had washed to the owner in London, and paid the carriage. Lost by the carrier, and action by laundress sustained on the ground that she had a special property in the linen; but admitted by both justices, Littledale and Parke, that if there be a complete sale, the property is out of the vendor altogether. There the vendor transmits as agent for the vendee.

Excepting cases of special contract where it has formerly been held, that the consignor may bring the action, I think the cases agree substantially that the action must be brought in the name of the consignee only, as the owner; and that the owner alone can bring the action. (Angell on Carriers, § 497.) In such case, he and not the consignor must bring the action, for the consignor has his remedy against the purchaser. (Id.) Where the contract of purchase and sale is not valid or complete by reason of the statute of frauds, the goods being over the value of £10, and the title, therefore, still vests in the consignor, though the goods have been delivered to the carrier, no acceptance, and all still vesting in parol, the action must be brought by the consignor. (*Coombs* v. *The Br. & Ex. R. Co.*, 3 Hurl. & Nor. 510.) But all the judges, in delivering opinions, admitted the rule to be, that the consignee must have brought the action had the order been in writing, and the sale valid. The question was whether the property passed to the vendee. If it did, he must sue.

In 1858 (see *Potter* v. *Lansing*, 1 J. R. 215). That the property passed to the consignee, in the case at bar on its delivery to the carrier "via the canal," is entirely clear. (*People* v. *Haynes*, 14 Wend. 546; Ang. on Carr. § 497; Smith's Merc. Law, 290, 5th ed.; 2 Kent's Com. 8th ed. p. in mar. 499, and cases cited.) There is nothing disclosed in the case to qualify or modify that title. In the language of the books, it is a complete sale. No special contract by the vendor with the carrier, and no payment of the price of transportation, if either could affect the title of the vendee. I think it clearly could not. The order being positive and in writing, and stating the mode of conveyance, where the goods were delivered to the carrier pursuant to that order, the title passed absolutely to the vendee, subject to the right of stoppage *in transitu*, and it gave no right of action to the vendor to sue for the loss of the vendee's goods, though the vendor, as agent for vendee, paid the carriage, or in like character, specially contracted with the carrier to transport. Had the consignor agreed with the consignees to deliver the goods to them at Rochester, the rule would be different. Then the consignees would not be the owners till delivery at Rochester. But upon what principle a vendor can sue for the loss of another's goods, it is difficult to see.

In this case the right of action being in the vendee under

the facts disclosed, the return of the empty barrel to the vendor, and his sending on another in no manner affected that right, either by extinguishing or by assigning it to the consignor.

Judgment should be reversed, and new trial ordered, costs to abide event.

All concur.

Judgment reversed.

Bailey et al. v. The Hudson River R. R. Co.

(49 New York, 70.—1872.)

On October 13, 1866, plaintiffs received an invoice of three cases of goods from Alden, Frink & Weston, and at once advanced to said firm three-fourths of their value, and in addition made a loan of $3,974.13, for which amount said firm gave its check. The check was not paid, and, to meet its indebtedness, said firm agreed to and did ship to plaintiffs eight more cases of goods, and sent invoices stating that the goods were consigned to plaintiffs. On or about October 16, all the cases were delivered to the defendant, consigned to the plaintiffs, and the defendant gave receipts therefor. On October 17, a member of said firm changed the destination of the goods, and the defendant delivered them in pursuance of such changed destination to another person.

In an action for the conversion of the goods, the court directed a verdict for the plaintiffs, and the judgment entered thereon was affirmed by the General Term of the Supreme Court.

Church, Ch. J. It is undisputed that Alden, Frink & Weston delivered the goods in question to the defendant, to be transported by them to the plaintiffs; that they were consigned to the plaintiffs, and the packages properly marked with the name of the plaintiffs' firm, and the defendant gave a receipt for the same, agreeing to deliver the goods safely to the plaintiffs at the city of New York. It is also undisputed that the plaintiffs had made a specific advance upon a portion of the goods, and the remainder were shipped in pursuance of an agreement between the plaintiffs and Alden, Frink & Weston, to

pay for money borrowed by the latter of the former a few days previous, and that invoices of all the goods, stating the consignment and shipment by the defendant's railroad, had been forwarded to the plaintiffs by mail. This was substantially the condition of things on the 17th of October, when one of the members of the firm of Alden, Frink & Weston, for his individual benefit, but in the name of his firm, changed the destination of the goods, and the defendant delivered them in pursuance of such changed destination to another person. The question is whether the title had vested in the plaintiffs. I think it had. It is clear that the consignors delivered the goods to the carrier for the plaintiffs in compliance with their contract to do so. The parol contract was thereby executed, and the title vested in the plaintiffs. The plaintiffs occupied the legal position of vendees after having paid the purchase-money and received the delivery of the goods. But it is unnecessary, in order to uphold this judgment, to maintain that the plaintiffs occupied strictly the relation of vendees. The legal rights of a vendee attach when goods are shipped to a commission merchant, who has made advances upon them in pursuance of an agreement between the parties. Such an agreement may be either inferred from the circumstances or shown by express contract. (*Holbrook* v. *Wight*, 24 Wend. 169; *Haille* v. *Smith*, 1 Bos. & Pul. 563.) In the latter case, Eyre, J., said: "From the moment the goods were set apart for this particular purpose, why should we not hold the property in them to have changed, in being in perfect conformity to the agreement and such an execution thereof as the justice of the case requires." The same principle has been repeatedly adopted. (*Grosvenor* v. *Phillips*, 2 Hill, 147.)

It must appear that the delivery was made with intent to transfer the property. Until this is done the parol agreement is executory, the title remains in the consignor, and he has the power to transfer the property to whomsoever he pleases, and render himself liable for the non-performance of the contract. It is urged by the counsel for the defendant that no bill of lading was forwarded or delivered to the plaintiffs, and that until this was done the title remained in the consignors. This is undoubtedly true in many cases; but it is mainly important in characterizing the act of the shipper, and showing with what purpose and intent the goods were delivered to the carrier. If A. has property, upon which he has received an advance from

B. upon an agreement that he will ship it to B. to pay the advance or to pay any indebtedness, he may or may not comply with his contract. He may ship it to C. or he may ship it to B. upon conditions. As owner he can dispose of it as he pleases. But if he actually ships it to B. in pursuance of his contract, the title vests in B. upon the shipment. The highest evidence that he has done so is the consignment and unconditional delivery to B. of the bill of lading. If the consignor procures an advance upon the bill of lading from a third person, or delivers or indorses the bill of lading to a third person for a consideration, it furnishes equally satisfactory evidence that the property was not delivered to the consignee, for the simple reason that it was delivered to some one else. But I apprehend that if a consignor who had made such an agreement retained in his own possession a duplicate of the bill of lading, and notified the consignee by letter that he had shipped the property for him in pursuance of the agreement, or in any other manner the intention thus to ship it was evinced, the title would pass as effectually, as between them, as if he had forwarded the bill of lading. The question whether a subsequent indorsee of the bill of lading for a valuable consideration could acquire any rights against the consignee, is not involved. As against the consignor the delivery of the property to the carrier, with intent to comply with his contract, vests the title in the consignee. It is largely a question of intention. In *Mitchell* v. *Ide*, 39 C. S. R. 260, cited by the defendants, Lord Denman said: "The intention of Mackenzie to transfer the property to the plaintiff is unquestionable, and we think that under the circumstances he has carried that intention into effect." And in *The Bank of Rochester* v. *Jones*, 4 N. Y. 501, this court said: "When the bill of lading has not been delivered to the consignee, *and there is no other evidence of an intention* on the part of the consignor to consign the specific property to him, no lien will attach." In that case the bill of lading was not only not sent to the consignee, but was transferred to the plaintiffs and money borrowed upon it, and there was no evidence of an intention to consign the flour to the defendant except upon the condition of paying the money so borrowed. It should be observed also that in that case there was no agreement to consign the property to the defendant as security, or in payment of the indebtedness due him from the consignor.

Such an agreement, either express or implied, is important, although not conclusive, in showing the intent with which the act was done. In this case there was no other bill of lading than the receipt produced in evidence, and no duplicate was taken; but the intention of Alden, Frink & Weston to transfer this specific property to the plaintiffs, to be applied upon their indebtedness, conclusively appears by the undisputed evidence. 1. By the agreement the day prior to the shipment. 2. By forwarding invoices of the shipment to the plaintiffs. 3. By making the shipment unconditionally. 4. By retaining the receipt given by the defendant, and neither making or attempting to make any use of it.

These acts were so unequivocal of an intention to transfer the property to the plaintiffs that there remains no room for doubt. The moment these acts were done, the title vested in the plaintiffs, and the consignors were powerless to interfere with the property.

The recent case of *The Cayuga County National Bank* v. *Daniels* (not reported) was decided against the consignees upon the distinction above referred to. It was held in that case that the consignors did not deliver the property to the carrier with the intention to vest the title in the defendants, except upon condition of paying a draft discounted by the plaintiffs, and that the bill of lading was delivered upon that condition, and that on the defendants' refusal to comply with the condition, they acquired no right or title to the property, and that the case therefore came within the principle of the *Bank of Rochester* v. *Jones*, *supra*. Here the intention to vest the title is clear and plain. It is urged that the words "on our account," in the invoices, evinced an intention not to vest the title in the plaintiffs. They can have no such effect in this case, even if standing alone and unexplained they might have. A bill of lading for which, as between the parties, the invoices were a substitute, can always be explained by parol. It may be shown by parol to have been intended as evidence of an absolute sale, a trust, a mortgage, a pledge, a lien or a mere agency. (2 Hill, 151; 4 N. Y. 501, and cases cited.) The actual agreement and transaction will prevail, and it was proved by two of the members of the firm, and uncontradicted, that the goods were in fact shipped in pursuance of the agreement. Besides, these words are not necessarily inconsistent with the agreement. The goods

were not purchased absolutely by the plaintiffs at a specified price, but were to be sold and the avails applied. The relation of the plaintiffs was more nearly that of trustee, having the title, and bound to dispose of the property and apply the proceeds in a particular manner, and the consignors were the *cestuis que trust*, having the legal right to enforce the terms of the agreement for their benefit. In this sense the property was shipped on their account, and the agreement is consistent with the meaning of those words. The statute of frauds has no application. 1. There was no sale. 2. If there was the consideration was paid. 3. The property was specified when the agreement was made as being that which had been and was then being shipped, and the plaintiffs agreed to accept that particular property, and the subsequent delivery to the carrier agreed upon was in legal effect a delivery to the plaintiffs. (*Cross* v. *O'Donnell*, 44 N. Y. 661; *Stafford* v. *Webb*, Lalors, Sup. 217.)

The defendant is liable for a *conversion* of the property. It had receipted the property and agreed to transport safely, and deliver it to the plaintiffs. Instead of complying with its contract, it delivered the property to another person by the direction of one who had no more legal authority over the property than a stranger, without the return even of its receipt. The plaintiffs had vested rights which the defendant was bound to respect, and with a knowledge of which it was legally chargeable. (45 N. Y. 49; 6 Hill, 586; 24 Wend. 169; Story on Bailment, 414; 31 N. Y. 490.) It was its duty to deliver the property to the real owner. (45 N. Y. 34.)

Judgment affirmed with costs.

All concur.

Judgment affirmed.

Fragano v. Long.

(4 Barnewall & Cresswell, 219.—1825.)

Assumpsit, against defendant as owner of the brig or vessel *James and Theresa*, for negligence in shipping a cask of hard ware. At the trial, the following facts appeared in evidence: Mason & Sons, hardwaremen, at Birmingham, in April, 1822, received the following order from the plaintiff:

"Naples, March 28th, 1822.

"Order transmitted by G. Fragano, of this city, to Mason & Sons, of Birmingham, through Mr. F. L. for the following merchandise, to be despatched on insurance being effected. Terms to be three months' credit from the time of arrival." The order then specified the goods. In pursuance of this order, the cask of hardware in question marked with the plaintiff's initials was sent by the canal from Birmingham, by Mason & Sons, to Messrs. Stokes, their shipping agents at Liverpool, with directions to forward the same to Naples. An insurance was affected, and the interest declared to be in Fragano. On the 3d of July, the goods were delivered on the quay to the mate of the *James and Theresa*, and were receipted for as follows: "Received in good order and condition on board the *James & Theresa*, for *Naples*, one cask of hardware.

"G. F. *Samuel Smith, Mate.*

"From *W. & J. Stokes.*"

The goods were left in the custody of the mate, and before they were actually put on board, by some accident the cask fell into the water, by which the injury complained of was sustained.

A verdict was directed for the plaintiff. A rule *nisi* for a new trial was obtained, on the ground, first, that no bill of lading having been made out, the property in the goods was never vested in the plaintiff; secondly, that by the terms of the order, the goods were not to be at the plaintiff's risk, until after their arrival at Naples.

Bayley, J. Considering this case apart from the order given by the plaintiff, it is quite free from doubt either in law

or justice. It appears, however, that the plaintiff sent an order to *Mason & Sons* at *Birmingham*, for the goods in question "to be despatched on insurance being effected. Terms to be three months' credit from the time of arrival." But for that order the goods never would have left *Mason's* warehouse, and when sent, they were marked with the plaintiff's initials. If the goods had been destroyed by lightning on the road to *Liverpool*, *Fragano* must have borne the loss. At *Liverpool*, *Stokes & Co.*, *Mason's* shipping agents, shipped the goods and took a receipt. It is argued that the agent was thereby enabled to maintain an action for the goods, but that *Fragano*, as his principal, could not. I think that position is not correct, although there might have been some difficulty had *Stokes & Co.* set up an adverse interest. It, therefore, seems to me, that as the goods left *Mason's* warehouse, by the order of the plaintiff, they were at his risk, and that he can maintain an action for them, unless the form of the order which he gave for them deprives him of that right. It has been urged, that the form of the order throws the risk upon the vendor until the arrival of the goods, for they were not to be paid for until three months from that period, and consequently that the arrival was a condition precedent to *Mason's* right to sue for the price. If, however, the goods were not to be paid for unless they arrived, why should the plaintiff insure them? That shows that the arrival was not considered as a condition precedent to the payment. If the goods arrived, three months from the arrival was to be the period of credit; if they did not arrive, still the plaintiff would be bound to pay in a reasonable time after the arrival became impossible. If this were not so, the insurance would be altogether nugatory, for *Fragano* could not sue upon it, neither could *Mason*, the interest being declared to be in *Fragano*. For these reasons, I am of opinion that the form of the order for the goods does not vary the case, and that the verdict was properly found for the plaintiff.

Rule discharged.

(HOLROYD and LITTLEDALE, JJ., concurred. Opinion by HOLROYD, J., omitted.)

WHEELHOUSE v. PARR.

(141 Massachusetts, 593.—1886.)

ACTION to recover $440.22, the purchase price of a quantity of leather sold to defendant.

Judgment for plaintiff; defendant appeals.

DEVENS, J. When goods ordered and contracted for are not directly delivered to the purchaser, but are to be sent to him by the vendor, and the vendor delivers them to the carrier, to be transported in the mode agreed on by the parties or directed by the purchaser, or, when no agreement is made or direction given, to be transported in the usual mode; or when the purchaser, being informed of the mode of transportation, assents to it; or when there have been previous sales of other goods, to the transportation of which in a similar manner the purchaser has not objected,—the goods, when delivered to the carrier, are at the risk of the purchaser, and the property is deemed to be vested in him, subject to the vendor's right of stoppage *in transitu*. This proposition assumes that proper directions and information are given to the carrier as to forwarding the goods. *Whiting* v. *Farrand*, 1 Conn. 60; *Quimby* v. *Carr*, 7 Allen, 417; *Finn* v. *Clark*, 10 Allen, 479, and 12 Allen, 522; *Downer* v. *Thompson*, 2 Hill (N. Y.), 137; *Foster* v. *Rockwell*, 104 Mass. 167; *Odell* v. *Boston & Maine Railroad*, 109 Mass. 50; *Wigton* v. *Bowley*, 130 Mass. 252.

The defendant had made a purchase of leather in November, previously to the purchase of that the price of which is in controversy, under a direction to the plaintiff to "ship to care of D. & C. McIver, shipping merchants, Liverpool, as soon as possible, for their next steamer to Boston direct." This shipment was made as ordered; and, on December 16, 1884, the defendant sent a further order, saying: "As regards the shipping of the leather just received, you have done everything satisfactory. Ship this order in like manner."

The directions by which the plaintiff was to be controlled must be interpreted as requiring him to forward the goods to D. & C. McIver, to be transported by them by the Cunard line, of which they were managers and agents. The words "their

next steamer" could not have meant any steamer which would accept freight from D. & C. McIver. Cases may be readily imagined where these words would be of the highest importance, as if the defendant had an open policy of insurance protecting his goods which might be sent by the Cunard line. It might also be true that the defendant would not deem a policy of insurance necessary when goods were sent by a well-established passenger line, where greater precautions might probably be taken for safety, which he would deem necessary when they were sent by a purely freighting steamer. The goods were actually forwarded to D. & C. McIver, with instructions in conformity with the directions of the defendant; and, had the matter ended there, so far as any directions to D. & C. McIver is concerned, the plaintiff would be entitled to treat them as delivered to the defendant, and to require him to pay the purchase money. If, on the other hand, while the goods were yet in the hands of the carrier, and before transportation of them had commenced, the plaintiff changed the directions given to him by the defendant, or authorized the carrier to transport them in a different mode from that directed by the defendant, and loss has thereby occurred, he cannot contend that they were delivered to the defendant by him. By continuing to exercise dominion over them, and by giving a new direction impliedly withdrawing the directions previously given, he cannot be allowed to assert that he had made a complete delivery by his original act, if a loss has occurred by reason of that which he has subsequently done or directed. The change in the directions given relates back to and qualifies the original delivery.

The plaintiff, in answer to a letter from D. & C. McIver, after the goods had reached them, inquiring whether they were to keep the goods "for our steamer 14th inst., or ship by the Glamorgan," ordered them to be shipped by the steamer arriving out first, presumably the steamer which D. & C. McIver believed would be the first to arrive. The Glamorgan was not a steamer of any line of which D. & C. McIver were owners or agents, and in no way answers the description of "their steamer" as applied to D. & C. McIver. By neglecting to limit the authority of D. & C. McIver to send by a steamer which could be thus described, and by directing them to send by the steamer which would first arrive, the plaintiff had failed to comply with the orders of the defendant as to the shipment of goods, and, if

correct directions had originally been given, had withdrawn them and substituted others. When, therefore, exercising the authority thus given by the plaintiff, D. & C. McIver send by the Glamorgan, as being in their judgment the steamer likely to arrive first, and a loss occurs, it should not be borne by the defendant, whose directions have not been followed.

Judgment for the defendant.

Unexcelled Fire-Works Co. v. Polites.

(130 Pennsylvania St. 536.—1890.)

Clark, J. This is an action of assumpsit, brought July 20, 1888, to recover the price of a certain lot of fire-works and celebration goods, ordered by the defendant, George Polites, from the Unexcelled Fire-Works Company, of New York, in February, 1888. The first order, which was for his store in New Castle, was given through the plaintiffs' agent, Alexander Morrison, and amounted to $208.53; the second, sent directly to the plaintiffs, was for the defendant's store in Washington, Pa., and amounted to $123.83. These orders were in writing, and were signed by the defendant; they specified, not only the particular kind and quality of the articles ordered, but contained also a schedule of the prices to be paid therefor. The goods were to be shipped in May, and were to be paid for on the 10th day of July thereafter. Upon receipt of these orders the plaintiffs transmitted by letter a formal acceptance of them; a contract was thus created, the obligation of which attached to both parties, and which neither of them, without the agreement or assent of the other, could rescind. On April 5, 1888, the defendant, by letter, informed the plaintiffs that he did not want the goods, and notified the plaintiffs not to ship them, as he could do better with another company. The plaintiffs replied that they had accepted the orders, and had placed them in good faith, and that the goods would be shipped in due time, according to the agreement.

The goods were shipped within the time agreed upon—the first lot to New Castle, and the second lot to Washington,

according to contract; but on their arrival the defendant declined to receive them. The carrier notified the shippers that, owing to the dangerous and explosive quality of the goods, they would not retain them in their possession; the plaintiffs thereupon received them back from the carriers, and placed them on storage, subject to the defendant's order.

The plaintiffs allege that they are manufacturers and importers of such fire-works as are used in the Fourth of July celebrations throughout the country; that it is not profitable to carry these goods over from one season to another, and that therefore the quantity manufactured and imported depends upon the extent of the orders received; that the defendant's orders entered into their estimates of goods to be made up and imported for the season of 1888, and that the goods ordered by the defendant were actually made up before the order was countermanded. The defendant testifies, however, that Mr. Morrison, the plaintiffs' agent, informed him, at the time he gave the first order, that the plaintiffs had some, at least, of the articles in stock, and that he did not order any, either to be manufactured or imported on his account; that the transaction was simply a bargain and sale of goods, and not an order for goods to be manufactured or imported; and the evidence does not seem to conflict with this view of the case.

It is plain that the notice given to the plaintiffs by the defendant not to ship the goods was a repudiation of the contract; it was not a rescission, for it was not in the power of any one of the parties to rescind; but it was a refusal to receive the goods, not only in advance of the delivery, but before they were separated from the bulk, and set apart to the defendant; the direction not to ship was a revocation of the carrier's agency to receive, and the plaintiffs thereby had notice of the revocation. The delivery of the goods to the carrier, therefore, was unauthorized, and the carrier's receipt would not charge the defendant. The plaintiffs made the carrier their agent for delivery, but the goods were in fact not delivered. A delivery was tendered by the carrier, when the goods arrived at their destination, but they were not received. The action, therefore, could not be for the price, but for special damages for a refusal to receive the goods when the delivery was tendered. We think the statement was sufficient to justify a recovery of such damages, as the words of the statement were clearly to this effect; but there was no evi-

dence given of the market value of the goods as compared with the price. It does not appear that the plaintiffs had suffered any damage. For anything that was shown, the goods were worth the price agreed upon in the open market.

Whilst the manifest tendency of the cases in the American courts, now, is to the doctrine that when the vendor stands in the position of a complete performance on his part, he is entitled to recover the contract price as his measure of damages, in the case of an executory contract for the sale of goods not specific, the rule undoubtedly is that the measure of damages for a refusal to receive the goods is the difference between the price agreed upon and the market value on the day appointed for delivery.

Judgment affirmed.

Baker et al. v. Bourcicault.

(1 Daly, 23.—1860.)

Defendant ordered by mail of plaintiffs a certain number of cards, and directed that same should be sent by express to him at New Orleans, and that he should be advised by letter of their departure, saying, "I will either send you back the amount by return of post, or the express may collect the same for you, at your option."

The cards were delivered to the Adams Express Company, addressed to "Dion Bourcicault, Gaiety Theatre, New Orleans, La.—C. O. D.," and were forwarded by steamer Crescent City. The steamer was lost at sea, and the defendant never received the cards.

By the Court. Daly, F. J. The defendant informed the plaintiffs that he would send back the amount of their bill by return of post, or the Express Company might collect it, at their option. The plaintiffs sent the box containing the cards to the Express Company, with directions to collect the bill on delivery. It is to be implied from such a direction that no credit had been given, and that the goods were to be paid for on delivery. The direction was understood by the Express

Company as an instruction to them not to deliver the goods unless the bill was paid. The agent of the Express Company, who received the box and gave a receipt for it, testified that when they receive goods in that way, they do not deliver them unless the bill is paid. The receipt was for a box and a bill, and had written upon it, in the handwriting of the witness, the initials C. O. D., the meaning of which, he testified, was, "collect on delivery."

When goods are sent in this way, to be paid for in cash, payment and delivery are simultaneous acts, and though the property be delivered, no title passes, unless it is apparent from the circumstances under which the delivery was made, that the vendor meant to trust to the ability and readiness of the vendee to perform his agreement, and did not intend to insist upon strict payment as a condition precedent to the passing of the title. Unless immediate payment is thus waived, the vendor may, by an action for a wrongful detention, reclaim the property, as his title in it is not divested until payment.

This rule, the soundness of which has been questioned per STORY, J., in *Connyer* v. *Ennis*, 2 Mason, 236, is now settled to be the law in this State, (*Russell* v. *Minor*, 22 Wend. 659; *Lupin* v. *Marie*, 6 id. 77; *Chapman* v. *Lathrop*, 6 Cow. 115; *Keeler* v. *Field*, 1 Paige, 312; *Haggerty* v. *Palmer*, 6 John. C. R. 437; *Palmer* v. *Hand*, 13 Johns. R. 434) and it is decisive upon the question arising in this case.

There is nothing to show that the plaintiffs intended to waive payment as a condition precedent to the transfer of the title in the goods to the defendant, but on the contrary, the circumstances of the case, I think, repel such a presumption. The defendant left it at their option whether he should send back the amount of their bill by return of post, or whether it should be collected by the Express Company. They chose the latter, and directed the Express Company to collect it *upon delivery*. This was certainly not indicating any intention to trust to the ability and readiness of the defendant—but if anything is inferable from it, it is the contrary. The Express Company understood it as a direction to them not to deliver unless the cash was paid; and had the goods reached New Orleans, they would have kept them as the property of the plaintiffs. The Express Company would have had no authority to deliver the goods relying upon the ability of the defendant, and waiving payment—or, if

they had delivered the box to him, to enable him to examine the contents, to see if his order had been properly executed, they, or certainly the plaintiffs, could have reclaimed it, if the defendant had failed to pay the bill when it was demanded. In *Goodall* v. *Skilton*, 2 H. Bl. 316, the plaintiff agreed to sell a quantity of wool to the defendant. Earnest was paid, rendering the contract valid under the statute of frauds. The wool was packed in the defendant's sacks and left upon the plaintiff's premises, the defendant agreeing to send his wagon for it in a few days. The defendant did not take the wool, and the plaintiff brought an action for goods sold and delivered; but as it appeared that the plaintiff had told the defendant's servant, while he was engaged in weighing and packing the wool, upon the latter's proposing to fix the time when the wagon should come, that the wool should not go off his premises until he had the money for it, the Court held that the action would not lie, the plaintiff having retained his right over the wool, and there being no right to it in the defendant. The numerous cases cited by the respondent, (*People* v. *Haynes*, 14 Wend. 546; *Dutton* v. *Solomonson*, 3 Bos. & Pul. 582; *Cooke* v. *Ludlow*, 5 id. 119; *Vale* v. *Bayle*, Cowp. 294; *Studdy* v. *Saunders*, 5 B. & C. 628; *Tarling* v. *Baxter*, 6 id. 360; *Richardson* v. *Dunn*, 1 T. & D. 417; *King* v. *Meredith*, 2 Camp. 639) merely establish the general principle, that when goods are ordered to be sent by a carrier, a delivery to the carrier operates as a delivery to the purchaser, in whom the property immediately vests, subject to the vendor's right of stoppage *in transitu*, and the goods, in the course of their transit, are at the risk of the purchaser. But every general rule has its qualifications. In none of these cases does it appear that the goods were to be paid for in cash upon delivery, and that makes a very material difference, as it shows, unless the contrary is indicated, that the property is not to pass until payment has been made. Up to the time when payment and delivery are to be simultaneous acts, the contract is in its nature executory, and the title to the property is in the vendor. *Benedict* v. *Field*, 16 N. Y. 596. It makes no difference that the goods have been sent by a particular carrier named by the vendee, if the carrier is instructed by the vendor that the goods are to be paid for on delivery. In such a case the carrier becomes the agent of the vendor, and has a claim upon him for the expense of the carriage and safe keeping

of the goods, if the vendee refuse to pay on delivery. Such was the relation of the parties in this suit, when the box was lost by the loss of the vessel in which it was shipped, on her way to New Orleans. The title to the goods had not passed to the defendant and the judgment of the Court below was erroneous.

Judgment reversed.

Higgins v. Murray.

(73 New York, 252.—1878.)

In April, 1873, the plaintiff agreed to manufacture a set of circus tents for the defendant. In the following month the tents were completed. Subsequently, the defendant, by letter, requested the plaintiff to ship the tents to Lewiston, Maine. The plaintiff accordingly shipped them C. O. D. to the defendant at Lewiston, and on the way they were destroyed by fire. The plaintiff then sued the defendant to recover their value, and obtained judgment which was entered upon the report of a referee and affirmed by the General Term of the Supreme Court.

Church, Ch. J. The action is not strictly for the sale of the article manufactured, but for work, labor, and materials, performed and used in its manufacture (*Mixer* v. *Howarth*, 21 Pick. 205); and hence is not within the statute of frauds. It is undisputed that the plaintiff performed his contract, and if the defendant had refused to take the tents, an action upon the agreement would have been sustained. (*Crookshank* v. *Burrell*, 18 J. R. 58.) There is some confusion in the authorities as to when the title passes to the purchaser in such cases. In *Andrews* v. *Durant*, 11 N. Y. 35, Denio, J., lays down the rule, that in such a case "the title does not pass until the article is finished and delivered, or at least ready for delivery, and approved by such party;" and there are other authorities to the same effect. (*Grippen* v. *N. Y. C. R. R.*, 40 N. Y. 36; *Comfort* v. *Kiersted*, 26 Barb. 473.)

It is urged in this case that the title did not pass, for two

reasons: First. Because there was no acceptance; and, second. Because the plaintiff shipped the property C. O. D., thereby refusing to deliver until the value was paid. This last ground was sustained in *Baker* v. *Bourcicault*, 1 Daly, 24, where certain cards were ordered to be sent to New Orleans, and were sent C. O. D., and lost at sea.

The important question to determine is when the liability of the defendant attached. If the article had burned during the progress of construction, it is clear that no action would lie, for the reason that the contract was an entirety, and until performed no liability would exist. And this rule, I apprehend, would apply when the contract is to make and deliver at a particular place, and loss ensues before delivery at the place, and for the same reason. But when the contract is fully performed, both as it respects the character of the article, and the delivery at the place agreed upon or implied, and the defendant is notified, or if a specific time is fixed, and the contract is performed within that time, upon general principles I am unable to perceive why the party making such a contract is not liable. One person agrees to manufacture a wagon for another in thirty days for $100, and the other agrees to pay for it. The mechanic performs his contract. Is he not entitled to enforce the obligation against the other party, and if after such performance the wagon is destroyed without the fault of the mechanic, is the undischarged liability canceled? It does not depend upon where the technical title is, as in the sale of goods. It was upon this principle substantially that *Adlard* v. *Booth*, 7 Car. & P. 108, was decided. The question was submitted to the jury whether the work of printing books was completed before the fire. Suppose, in this case, that the defendant had refused to accept a delivery of the tent, his liability would have been the same, although the title was not in him. The plaintiff had a lien upon the article for the value of his labor and materials, which was good as long as he retained possession. This was in the nature of a pledge or mortgage. Retaining the lien was not inconsistent with his right to enforce the liability for which this action was brought. That liability was complete when the request to ship was made by the defendant, and was not affected by complying with the request, nor by retaining the lien the same as when the request was made. As the article was shipped at the request of and for the benefit of the defendant (assuming

that it was done in accordance with the directions), it follows that it was at his risk, and could not impair the right of the plaintiff to recover for the amount due him upon the performance of his contract.

If the plaintiff had agreed to deliver the tent in Lewiston, as a part of the contract for its manufacture, he could not have recovered anything; but this was not a part of the contract. Suppose the tent had reached Lewiston in good order, and the defendant had refused to accept or receive it, his liability would be clear and complete. As before stated, the point as to who had the title is not decisive. It may be admitted that the plaintiff retained the title as security for the debt, and yet the defendant was liable for the debt in a proper personal action. This is a case of misfortune where one of the parties, without fault, must incur loss, and it seems to me very clear that the legal right is with the plaintiff. A point is made that the property was not properly shipped. It was directed to the defendant at Lewiston, and was forwarded to Portland on a steamer running to that place. It does not appear but that was the usual mode of shipment to Lewiston, and the deviation would impose the obligation upon the consignee at the latter place to forward the property by a connecting carrier. We cannot presume that there was no connecting route, and if we could it is difficult to see what else the plaintiff could have done. At all events it does not appear that the loss was occasioned by the defendant's negligence or fault in not properly shipping the goods.

The judgment must be affirmed.

All concur, except ALLEN and MILLER, JJ., absent.

Judgment affirmed.

BIANCHI v. NASH.

(1 Meeson & Welsby, 545.—1836.)

DEBT for goods sold and delivered. Plea, *nunquam indebitatus*. At the trial it appeared that the plaintiff was a dealer in musical snuff-boxes: that the defendant applied to him to *let* (or *lend*) him a musical snuff-box, and the plaintiff agreed to

do so, on the understanding that the defendant was to have it and pay for it if it were damaged; and the sum of £3 10s. was to be taken as its value. The defendant received the snuff-box on this understanding; it was damaged while in his possession; and the plaintiff, in consequence, refused to receive it back, and brought this action for the price. The under-sheriff left it to the jury to say whether the agreement was, that, in the event of the box being damaged, it was to be a sale: and they found that that was the agreement, and gave a verdict for the plaintiff, damages £3 10s.

A rule *nisi* for a new trial was obtained on the ground that this was a mere bailment, which ought to have been declared on specially, and that there was no evidence to support the count for goods sold and delivered.

Lord Abinger, C. B. I think there is no question at all on the general principle applicable to this case; when goods are sold on condition, and the condition is performed, the sale becomes absolute. And there is as little doubt on the evidence, that this was a conditional sale, and that the condition was performed. The defendant agrees to pay the price of the box for it, in case he damages it.

Parke, B. There was clearly evidence for the jury that this was a contract for a conditional sale; and it was a very reasonable contract. Then there is no doubt that the value was recoverable under the count for goods sold and delivered. As soon as the condition is performed, it is an absolute sale.

The other Barons concurred.

Rule discharged.[1]

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[1] See *Studdy* v. *Sanders*, 5 B. & C. 628.

SHIELDS ET AL. v. PETTIE ET AL.

(4 New York, 122.—1850.)

ASSUMPSIT to recover the price of a quantity of pig iron. The declaration was upon a special contract of sale, and also contained general counts for goods sold at a fixed price and at a *quantum valebant.*

At the trial it was proved that a contract was negotiated between the parties by a broker, and was concluded as follows:

"New York, July 19, '47.—Sold for Messrs. Geo. W. Shields & Co., to Messrs. Pettie & Mann, 150 tons Gartsherni pig iron, No. 1, at $29 per ton, one half at 6 mos., one half cash less 4 pr ct., on board Siddons.

"THOS. INGHAM, broker."

When the contract was made both parties understood that the ship was at sea. About 10 days later she arrived with the quantity, but not the quality, of iron contracted for. The defendants received between 60 and 70 tons of the iron, but, upon discovering the quality, declined to accept and pay for it, or for the residue. The plaintiffs offered to deliver the residue, and, upon the defendants' refusing to accept, demanded payment for the portion delivered at the contract price, and this being refused, they demanded the return of the iron. The defendants failed to comply. By this time the iron had advanced about $3.50 per ton above the contract price. The defendants had parted with a portion of the iron before demand for its return was made.

Plaintiffs recovered a verdict for $2,197.39, and entered judgment thereon.

HURLBUT, J. In my judgment the contract was not a sale but an agreement to sell, which was not executed, and which could only be required to be executed upon the arrival of the ship with the iron on board. The arrival of the vessel without the iron would have put an end to the contract, which was conditional, as a sale to arrive. The vessel was at sea at the time; this was known to both parties, and neither could be certain either of her arrival or of her bringing the iron. If a part only

had arrived, the plaintiffs would not have been bound to deliver nor the defendants to accept it. There was no warranty, express or implied, either that any iron should arrive, or that arriving, it should be of a particular quality. One hundred and fifty tons of Gartsherni pig iron of the quality denominated No. 1, was expected to arrive by the Siddons, and the contract was to the effect, that if that quantity and quality did so arrive, one party should sell and the other should receive it at a certain price per ton. The iron called for by the contract did not arrive, but iron of a different quality, and I think the contract was at an end. (*Boyd* v. *Siffkin*, 2 Camp. N. P. R. 326; *Alewyn* v. *Prior*, 1 Ryan & Moody, 406; *Lovatt* v. *Hamilton*, 5 Mees. & Wels. 639; *Johnson* v. *McDonald*, 9 id. 600; *Russell* v. *Nicholl*, 3 Wend. 112.)

The jury were instructed that under the circumstances of the case, the law implied a contract on the part of the defendants to pay for the iron which they received at the then value of the same in the market, and they found accordingly: which in effect compelled the defendants to pay for an inferior article a greater price than that stipulated for in the contract. This arose from the circumstance of a rise in the market, intermediate the contract and the time of delivery. But this ought not to affect the rule of damages which cannot bend to an accident of this nature, but must remain the same in a case like the present, whether the commodity rise or fall, or remain stationary in the market. Where, upon a sale of goods, there is no agreement as to the price, the law implies a contract on the part of the buyer to pay for them at the market value. The present case cannot be excepted from the operation of this rule. There was no error in the charge of the learned judge, provided the law implied a promise on the part of the defendants to pay anything whatever for the iron which they received. This they had taken in good faith, supposing that it answered the contract, and intending to pay for it accordingly; but finding it to be of an inferior quality, they declined to pay the contract price, and upon a demand of the iron were not in a condition to restore it, as they had parted with a portion of it. They however had received the iron rightfully, in the character of vendees, and up to the time of the demand by the plaintiffs, the case exhibits nothing in the nature of a tort, but savors altogether of contract. After the demand and refusal, the

case was so far modified as to assume, technically at least, the complexion of a tort, so that trover might have been maintained by the plaintiffs. But although they might have done so, were they bound to bring their action in that form, or were they at liberty to disregard the tort, and to treat the defendants as still retaining their original characters of purchasers of the iron, and to charge them accordingly? I perceive no reason why they may not be permitted to do so. The goods were neither wrongfully taken, nor do the defendants claim title to them. The case rested originally in contract, and the only difference between the parties, related to the price of the article delivered. If the plaintiffs had brought trover, the rule of damages would not have been more favorable to the defendants than the one laid down at the trial; and I am unable to perceive in what respect they can be injured by the present form of action. In general it would be the most favorable to the defendant. In *Young* v. *Marshall*, 8 Bing. R. 43, Ch. J. Tindal declared that no party was bound to sue in tort, when by converting the action into one of contract he does not prejudice the defendant. It is not necessary to go this length, nor as far as the court went in *Hill* v. *Davis*, 3 New Hamp. R. 384, for the purpose of determining the question before us; nor is the point presented in the last case of much importance, since the distinctions which obtained at common law in the forms of action, have been abrogated in this state. I therefore abstain from expressing any opinion upon it. It is enough for our present purpose, that in the case before us, the cause of action arose out of an imperfect sale and delivery of goods, and not out of a wrongful taking of them by the defendants; that the tortious feature in the case is scarcely one of substance but is rather of a technical character; that in effect the parties must be deemed to have agreed as to everything except the price of the goods; and that this being so, the plaintiffs were at liberty to disregard whatever might savor of tort, and require the defendants to respond in their substantial characters as purchasers of the iron for what it was worth in the market.

The judgment of the Superior Court ought to be affirmed.

Judgment affirmed.

SALTUS ET AL. v. EVERETT.

(20 Wendell, 267.—1838.)

ERROR from the supreme court. Everett brought an action of *trover* in the superior court of the city of New York against Messrs. Saltus, for a quantity of lead. In August, 1825, Bridge & Vose, merchants at New Orleans, shipped 179 pigs of lead on board the brig *Dove*, of which William Collins was master, consigned to Messrs. Tufts, Eveleth & Burrell, of New York, on account and risk of Otis Everett, the plaintiff, to whom they were referred for instructions. The *Dove* put into Norfolk in distress, and part of the lead was sold to pay expenses, and the residue was transferred in December, 1825, by an agent of Capt. Collins, to the schooner *Dusty Miller*, Captain Johnson, who signed a bill of lading, acknowledging the lead to have been shipped by F. M., agent for William Collins, and promising to deliver the same in New York, to order, on payment of freight. The *Dusty Miller* met with a disaster on her voyage to New York, and on her arrival there, the lead, by the order of Capt. Collins, was delivered to the firm of Coffin & Cartwright, who paid the freight, and $72.87, the *average contribution* charged upon the lead, for the loss occasioned by the disaster to the *Dusty Miller*. On the 9th of March, 1826, Coffin & Cartwright sold the lead to the Messrs. Saltus, the defendants, for $542.74, and received payment. The freight of the lead from New Orleans to New York amounted to $14.72. Everett brought an action against Coffin & Cartwright, to recover the value of the lead, but was nonsuited, in failing to prove that before suit brought, he offered to pay the *freight*, *average* and *charges* to which the lead was liable, and which had been advanced by Messrs. Coffin & Cartwright, and this court, on application, refused to set aside the nonsuit. (See 6 Wendell, 603.) In October, 1831, the plaintiff demanded the lead of the Messrs. Saltus, and offered to pay any lawful demands they had on the same; to which they answered, that they would have no further communication on the subject. It was proved that in March, 1826, one of the firm of Tufts, Eveleth & Burrell demanded of the Messrs. Saltus the lead, or its value, and received for answer that they had bought the

lead, and paid for it, and would not do anything about it. Upon this evidence the plaintiff was again nonsuited. Whereupon he sued out a writ of error, removing the record into the supreme court, where the judgment of the superior court was reversed. See opinion delivered in the supreme court, (15 Wendell, 475, *et seq.*). The defendants then removed the record into this court.

By Senator VERPLANCK. This cause, though of small magnitude as to the amount of property in question, has been contested in various forms through all the courts to this tribunal of last resort.

The spirit of contentious litigation ought to find little favor here; yet in this instance, I think, the parties have deserved well of the public, because the main question in the case is of great importance, and must frequently arise in a commercial community. It ought, therefore, to be distinctly settled on principles of general application. That those principles are not very clearly settled in our state, we need no higher evidence than the manner in which the cause now comes before us. The supreme court have reversed the unanimous decision of the superior court of law of the city of New York, and on the broad principles governing the questions which we are now to decide, there is a direct contrariety between the opinions of our highest court of common law and those of our most eminent commercial tribunal, as delivered by their chief justice, who was formerly chancellor of this state.

The main question depends upon and involves the general rule that ought to govern, between the conflicting rights of *bona fide* purchasers of personal property, bought without notice of any opposing claim, and those of the original owner, divested of the possession or control of his property by accident, mistake, fraud, or misplaced confidence. The original owner now claims his lead against purchasers who bought for a fair price, in the usual course of trade, from persons holding the usual evidence of such property, (a bill of lading endorsed to them,) and in actual possession of the goods. Of these two innocent parties, which of the two is to bear the loss arising from the wrongdoing of the third?

The universal and fundamental principle of our law of personal property, is, that no man can be divested of his property

without his own consent; and, consequently, that even the honest purchaser under a defective title cannot hold against the true proprietor. That "no one can transfer to another a better title than he has himself," is a maxim, says Chancellor Kent, "alike of the common and the civil law, and a sale, *ex vi termini*, imports nothing more than that the *bona fide* purchaser succeeds to the rights of the vendor." The only exception to this rule in the ancient English jurisprudence was, that of sales in markets overt, a custom which has not been introduced among us. "It has been frequently held in this country that the English law of markets overt had not been adopted, and consequently as a general rule, the title of the true owner cannot be lost without his consent." (2 Kent's Com. 324, and cases there cited.)

To whatever and however numerous exceptions this rule of our law may be subject, it is unquestionably the general and regulating principle, modified only by the absolute necessity or the obvious policy of human affairs. The chief justice of the superior court has said, in his opinion on this case, that "it must be conceded that a purchaser for a fair and valuable consideration, in the usual course of trade, without notice of any conflicting claim or any suspicious circumstances to awaken inquiry, or to put him on his guard, will, as a general rule, be protected in his purchase, and unaffected by any latent claim. But there are exceptions to this rule." Now I cannot agree with the learned chief justice that this is the general rule. On the contrary, I think it obvious that it is but the broad statement of a large class of exceptions to the operation of a much more general principle, and that statement of exceptions is subject again to many limitations. I have stated the general and governing law; let us now see what are precisely the exceptions to it.

The first and most remarkable class of these exceptions relates to money, cash, bank bills, checks, and notes payable to the bearer or transferable by delivery, and in short, whatever comes under the general notion of currency. It was decided by Lord Chief Justice Holt, at an early period of our commercial law, that money and bills payable to bearer, though stolen, could not be recovered after they had passed into currency; and this "by reason of the course of trade which creates a property in the holder." "They pass by delivery only, and are considered as cash, and the *possession* always carries with it the *property*."

(1 Salk. 126.) A long series of decisions, beginning with *Miller* v. *Race*, 1 Burr. 452, has now settled the law, that possession of such paper is presumptive proof of property, and that he who received it in the course of trade for a fair consideration, without any reason for just suspicion, can hold it against the true owner, and recover on it against the drawer, maker, and other parties, even if the paper had been stolen from or lost by the former holder; such former holder retaining all his original rights only against the thief or the finder, or whoever received the paper from them under suspicious circumstances. These decisions have been argued upon as authorities (at least in the way of analogy) both at bar and in opinions of the courts, in cases involving the same question as to goods or other movable property. Hence, it was inferred that goods bought or received "in the course of trade, stand on the same footing with bank notes or checks so received." But an examination of the cases will show that this part of the law of negotiable paper rests on grounds quite peculiar to itself, for the following reasons: 1. The protection of the *bona fide* holder of paper, transferable by delivery, extends even to cases where the paper has been lost or stolen. But it has been often decided that loss by accident, theft, or robbery, does not divest the title of the owner of *goods*, nor give a title in them to a fair after purchaser. 2. The rule is put by all the authorities on the express and separate ground of the necessity of sustaining the credit and circulation of the currency. Thus Lord Chief Justice Hardwicke: "No dispute ought to be made with the holder of a cash note, who came fairly by it, for the sake of currency, to which discrediting such notes would be a great disturbance." See, too, the reasoning of Lord Mansfield, in all cases on this head decided before him. Thus, says he, in the case of a stolen note, *Peacock* v. *Rhodes*, 1 Doug. 636, "An assignee must take the thing assigned, subject to all the equity to which the original party was subject. If this rule was applied to bills, it would stop their currency." Similar reasons are assigned for the same decision by American judges. 3. The analogy between notes and movables or goods, is expressly denied in the leading cases on this head. Thus, in reply to an argument founded on that similarity, Lord Mansfield answers, (1 Burr. 457:) "The whole fallacy of the argument rests upon comparing bank notes to what they do not resemble, and what they ought not to be com-

pared to, viz., goods, or securities, or documents for debts. Now, they are not goods, nor securities, nor similar to them; they are treated as cash to all purposes," etc.

Setting wholly aside, then, this part of the law as to cash, bank notes, and bills to bearer, as founded on the peculiar necessities of currency and trade, and regulated by decisions and usages peculiar to itself, what rules do we find to obtain in other instances of conflict between the rights of original owners and those of fair purchasers? After a careful examination of all the English cases and those of this state, that have been cited or referred to, I come to this general conclusion, that the title of property in things movable can pass from the owner only by his own consent and voluntary act, or by operation of law; but that the honest purchaser who buys for a valuable consideration, in the course of trade, without notice of any adverse claim, or any circumstances which might lead a prudent man to suspect such adverse claim, will be protected in his title against the original owner in those cases, and *in those only*, where such owner has by his own direct voluntary act conferred upon the person from whom the *bona fide* vendee derives title, the apparent right of property as owner, or of disposal as an agent. I find two distinct classes of cases under this head, and no more.

I. The first is, when the owner, with the intention of sale, has in any way parted with the actual property of his goods, with his own consent, though under such circumstances of fraud or error, as would make that consent revocable, rescind the sale, and authorize the recovery of the goods as against such vendee. But if the property passes into the hands of honest purchasers, the first owner must bear the loss. Thus, to take an instance from our own reports, where goods were obtained by a sale on credit, under a forged recommendation and guaranty, and then sold to a *bona fide* purchaser in the customary course of trade, the second buyer was protected in his possession against the defrauded original owner. (*Mowry* v. *Walsh*, 8 Cowen, 243.) So, again, where the owner gave possession and the apparent title of property to a purchaser, who gave his worthless note, in fraudulent contemplation of immediate bankruptcy, a fair purchase from the fraudulent vendee was held to be good against the first owner. (*Root* v. *French*, 13 Wendell, 572. See also, *McCarty* v. *Vick*, 12 Johns. R. 348.) In all such

cases, to protect the new purchaser, there must be a full consent of the owner to the transfer of property, though such consent might be temporary only obtained by fraud or mistake, and therefore revocable against such unfair purchaser.

II. The other class of cases in which the owner loses the right of following and reclaiming his property is, where he has, by his own voluntary act or consent, given to another such *evidence* of the right of selling his goods as, according to the custom of trade, or the common understanding of the world, usually accompanies the authority of disposal; or, to use the language of Lord Ellenborough, when the owner, "has given the external *indicia* of the right of disposing of his property." Here it is well settled that, however the possessor of such external *indicia* may abuse the confidence of his principal, a sale to a fair purchaser divests the first title, and the authority to sell so conferred, whether real or apparent, is good against him who gave it.

Thus, the consignee, in a bill of lading, is furnished by his consignor with such evidence of right of disposal, according to the custom and law of trade, so that the *bona fide* holder of the bill endorsed by the consignee is entitled to all the rights of property of the consignor in those goods, if bought fairly in the course of business, although the actual consignee, under whose endorsement he holds, has no right to the goods as against the former owner. If such goods were not paid for, they might be stopped *in transitu* by the owner, unless his consignee has already assigned his bill of lading; but that assignment divests the owner of his right of stoppage against such assignee.

The famous series of decisions in the various courts in the case of *Lickbarrow* v. *Mason*, 2 T. R. 63; 2 H. Black. R. 211; 5 T. R. 367, which led to the establishment of the doctrine of this qualified negotiability of bills of lading, memorable alike in legal and commercial history, strongly illustrates the whole question before us. There, Buller and his associate judges, trained up at the feet of the great father of English commercial jurisprudence, maintained and established the law as we now hold it, under the influence of Mansfield's genius, upon his reasoning and on his authority, against those of Lord Loughborough and others, the most learned lawyers of their times. All the arguments and admissions of both sides show how deeply the general principle is rooted in the law of England, that (to

use Lord Loughborough's words) "mere possession, without a just title, gives no property, and the person to whom such possession is transferred by delivery, must take the hazard of the title of its author." It is only as an express exception to this rule that it was maintained, and finally established, that the custom of merchants, evidenced and sanctioned by legal decisions, and founded on those conveniences of trade, so admirably stated by Buller, had compelled the courts to consider the owner as giving his consignee evidence of the power of disposal, which it was not for him to dispute when the goods had fairly passed into other hands, on the faith of that evidence. But there is no case to be found, or any reason or analogy anywhere suggested in the books, which would go to show that the real owner could be concluded by a bill of lading not given by himself, but by some third person, erroneously or fraudulently, as in this present case. The assignment of the bill of lading conveys, not an absolute right to goods, but the right and title merely of the actual consignor, who alone is bound by it.

Again: the owner may lose the right of recovering his goods against purchasers, by exhibiting to the world a third person as having power to sell and dispose of them; and this, not only by giving a direct authority to him, but by conferring an implied authority. Such an authority may be implied by the assent to and ratification of prior similar dealings, so as to hold such person out to those with whom he is in the habit of trading, as authorized to buy or sell. It may be inferred from the nature of the business of the agent, with fit accompanying circumstances. "If a man," says Bayley, J., in *Pickering* v. *Buck*, 15 East, 44, "puts goods into another's custody, whose common business it is to sell, he confers an implied authority to sell," and the cause was decided on that ground. But this implied authority must arise from the natural and obvious interpretation of facts, according to the habits and usages of business; and it never applies where the character and business of the person in possession, do not warrant the reasonable presumption of his being empowered to sell property of that kind. If, therefore, to use an illustration of Lord Chief Justice Ellenborough, in the case just cited, a person entrusts his watch to a watchmaker to be repaired, the watchmaker is not exhibited to the world as an owner or agent, and credit is not given as such, because he has possession of the watch; the owner, therefore,

would not be bound by his sale. When these exceptions cease, the general rule resumes its sway; and the law is therefore clear, that an agent, for a particular purpose, and under a limited power, cannot bind his principal if he exceed his power. "Whoever deals with an agent constituted for a special purpose, deals at his peril, when the agent passes the precise limits of his power." (2 Kent's Com. 621, and the authorities there cited.)

Beyond the precise exceptions I have above stated, I think our law has not carried the protection of the fair vendee against the defrauded or unfortunate owner. It protects him when the owner's misplaced confidence has voluntarily given to another the apparent right of property or of sale. But if the owner loses his property, or is robbed of it, or it is sold or pledged without his consent by one who has only a temporary right to its use by hiring, or otherwise, or a qualified possession of it for a specific purpose, as for transportation, or for work to be performed on it, the owner can follow and reclaim it in the hands of any person, however innocent. Among the numerous cases to this effect, I will cite only that of *Howe* v. *Parker*, 2 T. R. 376, which I select not only on account of the strong and unhesitating manner of the decision, but because it was pronounced by the very judges who, in the case of *Lickbarrow* v. *Mason*, had carried the protection of a *bona fide* purchaser under a bill of lading far beyond the rigor of the ancient law. There, plate had been pawned by a widow who had only a life interest in it under her husband's will, of which fact the pawnee had no notice. It was not doubted that the lien for the moneys advanced on such pledge was void against the remainderman, after the widow's death. "*Per curiam:* This point is clearly settled, and the law must remain as it is, until the legislature think it fit to provide that the *possession* of such chattels is *proof of ownership*." In order to decide in such conflicts between the claims of equally meritorious sufferers by the wrong of a third party, public policy must draw an arbitrary line somewhere, and the greatest merit of such a rule must be its certainty and uniformity.

The rule of our law, as I understand it, is perfectly consistent with the equity between the parties, as far as such equity can apply; and it serves the great interests of commerce, in a state of such extensive foreign and domestic trade as ours, by

protecting the property of the stranger, as well as of our own citizens, against the possible frauds of carriers by sea, or by internal transportation, whilst it throws upon the resident merchant the responsibility of taking care with whom he deals, and teaches him a lesson of wholesome caution. It is no mean proof of the wisdom of the rule, that it agrees in substance with the provisions of the Napoleon Code. The Code, like our law, holds as a general rule, that the sale of goods by any but the true holder, is a nullity; "*La vente de la chose d'autrui est nulle.*" (Code Civil III. art. 1599.) It confines the authority of the special agent or *mandataire* to the strict limits of his power; and in sales, the power must always be special and express. (Code Civil, art. 1989.) It allows the right of *revendication* or stoppage *in transitu* against the insolvent or fraudulent purchaser or consignee; but that right ceases, as with us, against the consignee, when the goods have been fairly sold according to the bills of lading; "*vendues sans fraude sur factures et connaissements.*" (Code de Commerce, Liv. III. art. 576, 577, 578.) The Scotch law, as I gather from Belle's Commentaries, lays down a different rule, that "a purchaser, in the course of trade, should be protected in the purchase of goods from any one who has them in lawful possession." This agrees with the doctrine of our superior court, and might be a safe enough rule if generally adopted and understood. But it is not the rule of our own law, which is perhaps quite as wise, as well as certainly founded on a much larger and wider commercial experience.

Let us apply these conclusions to the present case. Collins, the person whose sale it is asserted must divest the original owner of his rights in favor of the *bona fide* purchaser, stands, it is said by the superior court, in a double relation of "a master, who is at the same time the consignee of the goods, and who himself filled the character of shipper, and has therefore an undoubted power to sell, and his *bona fide* transfer will be effectual to purchasers against any secret trust for others with which his apparent title might be affected." Had the lead been consigned to Collins from the intermediate port, by the *owner* or his agent, this would be true. But it is shipped by Myers, of whom neither the owner, nor any one with full power to represent him in this matter, had any knowledge as an agent, and under whose care the vessel and cargo were placed by Collins.

so that he appeared only as his representative, and thus he styles himself in the bill of lading. The plaintiff below comes in no wise within the rule I have stated. He has neither given to Collins documentary and mercantile evidence of property in a bill of lading from himself or his own agent with competent power, nor the evidence customary in business, such as to hold him out as an agent authorized to change the title of his property in his goods. The assumed authority of shipping goods in his own name and to his own order, at Norfolk, and the documentary evidence of it in the bill of lading, can have no more effect as to the title of the property, than if he had forged such a bill of lading at New Orleans.

Neither does the selection of a ship and its master vest in the master any implied authority to sell the ship, or any part of her cargo. His business is to carry the goods, and no more, with some other clearly defined and very limited powers, to be exercised only in cases of absolute necessity. He stands in the same legal relation to his cargo with the watchmaker, in the case supposed by Lord Ellenborough, who has in his hands a watch to be repaired. He is not exhibited to the world as the owner, or agent for selling: and if he does sell it, the sale is void against the true proprietor. The law of shipping is well known to the commercial world, to declare that the master has no authority to sell the cargo, or any part of it, unless under circumstances of pressing necessity abroad; and of that absolute necessity, the burden of proof rests on the purchaser, and the presumption is against it. As Judge Bayley states the law, 3 Barn. & Cress. 196, "The captain has no right to act as *agent* for the owner of goods, unless in absolute necessity. The purchaser obtains no property by the act of his professing to sell." And this was held where the master acted in perfect good faith. How much stronger is the case of a probable fraud! Thus again, in *Freeman* v. *East India Co.*, 5 Barn. & Cress. 619, Abbott, Ch. J., says, "a sale of a cargo, or any part of it, by the master, can confer no title, unless there was an absolute necessity;" and the reason of the rule is thus assigned by Judge Best in the same case: "A carrier by sea and by land stands in the same relation to the owner of goods to be carried. Their duty is to carry the goods, and the authority only such as is necessary. The purchaser, knowing that necessity alone can justify the sale, and give him a title to what he buys, will assure himself that

there is a real necessity for the sale before he makes the purchase; and *caution on his part will prevent what has frequently happened, the fraudulent sale of ships and cargoes in foreign ports.*" Such, then, being the well-settled and generally known law, the selection of a master or any other carrier, by sea or land, does nothing to exhibit such carrier to the world as having the power of disposing of the goods he carries. The owner does nothing to enable him to commit a fraud on third persons. He gives merely a qualified possession, and if that is turned into an assumed right of ownership, it is tortious conversion, and will not divest the owner's title.

It is true that the rule will sometimes, as was urged by Chief Justice Jones, "involve purchasers in great perils;" but that peril can scarcely be called "unreasonable," since there is a reason of public policy of at least equal weight to counterbalance this inconvenience. It is the same which is the ground of the absolute prohibition to a master or carrier to sell the goods he transports, except under insurmountable necessity; it is to prevent, in the language of the court in the case just quoted (5 Barn. & Cress. 623), "fraudulent sales of ships and cargoes in foreign ports." Now the fraudulent consignment or change of the apparent evidence of property for the purpose of selling elsewhere, is but another form of the same evil. I may add that this same rule, however rigid and occasionally hard in its operation, is no small safeguard to the protection of the owner's rights in goods and other property, in active commerce necessarily placed under the temporary control, and in the legal though qualified possession of agents, sailors, carriers, boatmen, servants, and clerks, as well as of those who may have them stored for safe keeping, and their clerks, porters, and servants.

On the other question, as to the right of the defendants below to stand in the place of their vendor, and to be protected to the extent of the charges on the lead for freight, as claimed by Collins, I need say but little. The right of lien in such circumstances (if any right exist here), depends upon actual possession by the factor or carrier, or his immediate agent. When the goods are sold and delivered to a third person, the lien, as such, expires with the possession. This is the distinction between the present case and the former suit against Coffin & Cartwright, who were immediate agents or bailees of Collins.

The two courts below have agreed in deciding against the

validity of the objections to the evidence raised on the trial of the cause, and I have nothing to add to the reasons they assign; to all which I fully assent.

The importance of the principles and rules not only of decision but of active business involved in this cause, especially in relation to that vast and busy community which I immediately represent in this body, has led me to examine this whole head of law with an interest and at a length wholly disproportioned to the amount of value in controversy. If the views I have been able to present shall in any way, directly or indirectly, tend to settle the law on this head, or make it more clearly and correctly understood, the study I have given the subject will have been well bestowed.

I am of opinion that the judgment of the Supreme Court, reversing that of the Superior Court of New York, be affirmed.

Judgment unanimously affirmed.

COMER v. CUNNINGHAM.

(77 New York, 391.—1879.)

ACTION of replevin.

Verdict for defendant was sustained by the General Term of the Supreme Court.

RAPALLO, J. The forty-five bales of cotton claimed by the plaintiff in this action were part of a lot of sixty bales which were on the 18th of November, 1870, shipped from Savannah, Georgia, to the firm of James B. Cunningham & Co. of New York, by F. S. Williams, a business correspondent of that firm, who was in the habit of shipping cotton to them and drawing against it for advances thereon.

A bill of lading of the cotton on board the steamer San Salvador, with a sight draft attached thereto, drawn by Williams upon Cunningham & Co. for $4,500 payable to the order of Bryan & Hunter, of Savannah, and indorsed by them, were presented to Cunningham & Co., at New York by the agents of Bryan & Hunter, on the 21st of November, 1870, and Cun-

ningham & Co. thereupon paid the draft and received the bill of lading, in the usual course of business. The payment of the draft was made as an advance upon the cotton on the faith of the bill of lading. In the bill of lading Williams was named as the shipper of the cotton. It was deliverable to order and the bill of lading was duly indorsed. Cunningham & Co. had no knowledge of any claim of any person on the cotton, and upon the uncontroverted evidence they stand in the position of *bona fide* purchasers of the cotton, or lenders thereon in good faith. The defendant is the representative of Cunningham & Co.

Cunningham & Co. obtained possession of the cotton under the bill of lading and put it in store, where it remained until the 25th of November, when the forty-five bales in question were replevied in this action by Bates & Comer of Savannah.

The grounds upon which they claim to be entitled to take the cotton are, that the sixty bales shipped by Williams as above stated were part of a lot of 117 bales sold by the firm of Bates & Comer (of whom the plaintiff is survivor) to Williams, at Savannah, in November, 1870, for cash. The price of the whole lot was $8,676.20. The plaintiff testified that the 117 bales were delivered to Williams on the 18th of November, 1870, and that on the next day, Saturday the nineteenth, Williams gave to plaintiff two checks on Bryan & Hunter; one for $6,000, which was paid, and one $2,676.20 which was not paid. It appears that the sixty bales shipped to Cunningham & Co., were on the 18th of November delivered by the sellers by direction of Williams, at the compress, being the place where cotton was pressed by the steamers, preparatory to shipment and that they were on the same day laden on board the steamer and the bill of lading before mentioned was issued to Williams.

He thereupon drew the $4,500 draft on Cunningham & Co., and presented the same, with the bill of lading, to Bryan & Hunter who discounted the draft, and against the proceeds of this discount and other moneys in their hands, Williams drew the before-mentioned checks on Bryan & Hunter for $6,000 and $2,676.20 in favor of the plaintiff's firm, for the purpose of paying for the 117 bales, and plaintiff's firm on the next day collected the $6,000 check as before stated. Williams testifies that the check for $2,676.20 was dated some days ahead and also that he informed plaintiff of the shipment at the time, but

as these facts are controverted they are not taken into consideration.

No condition appears to have been attached by the parties, to the delivery of the cotton on the eighteenth of November, nor is it alleged that Williams obtained possession of it by means of any fraud. It was voluntarily and absolutely delivered by the vendors, in the usual course of business, and no question would arise as to the title of Williams or of Cunningham & Co., but for a statute of the State of Georgia, upon which the plaintiff relies to maintain this action.

This statute provides that "cotton, rice, and other products sold by planters and commission merchants on cash sale shall not be considered as the property of the buyer, or the ownership given up, until the same shall be fully paid for, although it may have been delivered into the possession of the buyer."

It is not claimed on the part of the plaintiff that this statute has any force, *ex proprio vigore*, in this State, but the claim made is, that the statute being the law of the State where the parties resided, and the property was, and where the contract was made and to be performed, it entered into the terms of the contract, and became a part of it, to the same extent as if its essential provisions had been written into it.

Assuming this position to be correct, the questions arise, first, what was the nature and effect of the dealing between the vendors and Williams, as construed by including the provisions of this statute as part of the contract, and secondly, what are the rights of a *bona fide* purchaser from Williams.

The plaintiff contends that the effect of incorporating the statute into the contract was to make the sale to Williams a conditional sale, but I apprehend that this is not an accurate view. The sale was a present, absolute sale; not executory nor depending upon any contingency. The obligation of the buyer to pay was absolute, and the property was at his risk. If it had been destroyed, or lost on the voyage, his obligation to pay would not have been discharged, notwithstanding that as between him and his vendors the title had not passed. The statute did not purport to affect any of these rights, or to attach any condition to the contract of sale. It simply made the *delivery* conditional, and if written into the contract would affect nothing but the delivery. The property in that case stood in precisely the same condition after its delivery to Wil-

liams at Savannah, as if the transaction had taken place in this State, and the vendor on a cash sale had expressly attached to the delivery a condition that the title should not pass until payment of the price. Such transactions are of common occurrence in this State, and the rights of the vendor and vendee and of *bona fide* purchasers from the vendee, are well settled by the adjudications of our courts. Where goods are sold to be paid for, in cash or by notes on delivery, if delivery is made without demand of the notes or cash the presumption is that the condition is waived, and the complete title vests in the purchaser; but this presumption may be rebutted by proof of acts or declarations and circumstances showing an intention that the delivery shall not be considered complete until performance of the condition, and the question of intention is one of fact. But after actual delivery, although as between the parties to the sale such delivery be conditional, a *bona fide* purchaser from the vendee obtains a perfect title (*Smith* v. *Lynes*, 5 N. Y. 41; *Fleeman* v. *McKean*, 25 Barb. 474; *Beavers* v. *Lane*, 6 Duer, 238), though a voluntary assignee of the purchaser does not. (*Haggerty* v. *Palmer*, 6 J. R. Ch. 438.) The statute of Georgia having no operation here as law, its only effect can be to place the parties in the same position as if it had been stipulated at the time of the delivery to Williams that such delivery should be conditional upon payment, and we must apply to the case the law of this State which protects a *bona fide* purchaser from one to whom goods have been conditionally delivered, against the claims of the original vendor. *Rawls* v. *Deshler*, 3 Keyes, 572, is very much in point. Deshler sold a quantity of corn to Griffin, and gave him an order on the elevator to deliver the corn to him "subject to my order till paid for." This delivery was clearly conditional. The Georgia statute was actually incorporated into the contract, and neither Griffin nor his execution creditor or voluntary assignee, could have resisted successfully a claim of the vendee to retake it. Yet this court hold that Griffin having shipped the corn and drawn against it, the drawees, having paid the draft on the faith of the bill of lading, were protected as *bona fide* purchasers, and also under the factor's act.

In *Wait* v. *Green*, 36 N. Y. 556, the vendor of a horse delivered it and took from the purchaser a note at foot of which was a memorandum signed by the vendee: "Given for one bay

horse. The said Mrs. Comins (the vendor) holds the said horse as her property until the above note is paid." This court held that a *bona fide* purchaser from the vendee obtained a good title. This case is supposed to be in conflict with *Herring* v. *Hoppock*, 15 N. Y. 409; *Ballard* v. *Burgett*, 40 id. 314, and *Austin* v. *Dye*, 46 id. 500. If the transaction is to be regarded as a conditional sale, the case is in conflict with the two last cited cases in 40 and 46 N. Y., but it can well be treated as a case only of conditional delivery. In *Ballard* v. *Burgett* it was held that where the sale was conditional, no title passed to the vendee, because there was no sale until the condition was performed, and the so-called vendee was a mere bailee with a contract for a future sale. That the property while in his hands was at the risk of the vendor, and the so-called vendee was not liable for the price. That he had no title to the property and could convey none, even to a *bona fide* purchaser; that there was no sale, and he had a mere possession, and that the finding of the referee that the agreement was that the property was to remain the property of the plaintiff till the $180 were paid, was incompatible with the finding of a sale, and the true construction of the contract was that the oxen were delivered under an agreement that when the party receiving them should pay $180, the party delivering them would sell the oxen. *Wait* v. *Green* was distinguished, and it was held that under the circumstances of that case if the horse had died before payment of the note such death would have been no defense to the note, and that was a conclusive circumstance showing that the condition expressed in the note was a mere security for the price. Whereas in the case at bar had the oxen died no action could have been maintained for the purchase-money. The cases holding that where there is a sale and a conditional delivery a *bona fide* purchaser from the vendee acquires a good title discharged of the lien for the purchase-money are cited, but they are not attempted to be overruled nor are they questioned. In *Austin* v. *Dye*, 46 N. Y. 500, the principle of this decision is clearly stated, and is, that one having possession of personal property as bailee, with an executory and conditional agreement for its purchase, the condition not having been performed, can give no title to a purchaser though the latter acts in good faith and parts with value without notice of the want of title. In that case the alleged vendee was to pay hire for

the oxen until he should pay a specified sum in a specified manner in lumber, and then he was to become the owner. Until then there was no sale, and they were at the risk of the bailor, who received hire for their use. The sale was executory as that in *Ballard* v. *Burgett* was construed to be. In *Herring* v. *Hoppock*, 15 N. Y. 409, and *Strong* v. *Taylor*, 2 Hill, 326, the question of the rights of a *bona fide* purchaser did not arise and it is therefore immaterial to consider whether those were cases of conditional sale or conditional delivery. In the present case it cannot be pretended that the sale was executory or conditional. It was an absolute unconditional sale, and the greater part of the purchase-money, much more than sufficient to cover the price of the bales received by the defendant's firm, had actually been paid. There is no feature, favorable to the plaintiff, by which it can be distinguished from *Smith* v. *Lynes*, 5 N. Y. 41, and the cases there referred to, and that case and *Rawls* v. *Deshler*, 3 Keyes, 572, establish that a condition that the title shall not pass until payment, when attached to a delivery upon an actual completed contract of sale, is available only as against the vendee and persons claiming under him, other than *bona fide* purchasers without notice.

This view renders it unnecessary to examine that branch of the defense which rests upon the factor's act. The case falls literally within the provisions of the act, but it has been said in numerous cases that the first section of the act applies only when the shipment has been made with the consent of the owner, in the name of another person. There is no adjudicated case which rests upon that proposition, and it may be an open question whether under the circumstances of the present case the statute would not be a protection, but as the ground already discussed is sufficient to decide the case time will not be consumed in that inquiry.

The judgment should be affirmed.

All concur.

Judgment affirmed.

COLE ET AL. v. MANN.

(62 New York, 1.—1875.)

ACTION for conversion of a piano.

Plaintiffs shipped the piano in question to one Jenne, and with it the following bill of lading:

"TOWANDA, PA., 187 .

"Consigned by Cole, Passage & Co., to one style , No. , $, to become the property of the consignees, upon payment of the cash and notes as above."

Mr. Jenne signed and returned the following note:

"Until this note is paid, style twelve, Mateerscheck Pianos, No. 2,710, shall remain the property of Cole, Passage & Co., Towanda, Pa."

"LOCKPORT, N. Y., Nov. 15th, '72.

"Four months after date I promise to pay to the order of Cole, Passage & Co., three hundred and ninety dollars, at Lockport Banking Association, Lockport, N. Y. Value received. C. H. Jenne."

The parties had previously agreed that the title to the piano should remain in the plaintiffs, until paid for, and that Jenne, in case he sold the piano, should remit of the proceeds sufficient to pay the above note; if, however, Jenne made a conditional sale of the piano, it was agreed that title was still to remain in the plaintiffs, and a note or notes were to be taken from such purchaser in the form above set forth.

The piano in question was sold by the sheriff on an execution issued against Jenne, and at the sale, as well as before, he was notified of plaintiffs' rights, who demanded the piano and forbade the sale.

RAPALLO, J. If there had been any conflict in the evidence respecting the title of the plaintiffs to the piano which rendered it proper to submit that question to the jury, we should, in accordance with the settled practice of this court, dismiss the present appeal. The case came before the General Term on appeal from an order denying a motion for a new trial upon the minutes, and the reversal of that order by the General Term consequently might have been upon questions of fact. The

case would not, therefore, be properly appealable to this court. (*Wright* v. *Hunter*, 46 N. Y. 409; *Sands* v. *Crooke*, id. 564.)

But we are of opinion that there was no such question of fact in the case. The uncontroverted evidence showed a conditional sale, only to Jenne, the judgment debtor. The piano was consigned to him, accompanied with a written instrument stating that it was consigned, and that it was to become his property on payment of the price. And upon the face of the note, given by him for the price, it was stated that until such note was paid the piano should remain the property of the plaintiffs. Under such an arrangement the title does not pass to the consignee. (*Ballard* v. *Burgett*, 40 N. Y. 314; *Herring* v. *Hoppock*, 15 id. 409.)

There was no evidence contradicting or impeaching these documents, or showing that the piano was delivered to Jenne upon any other agreement than that therein expressed. The fact that Jenne was a dealer in pianos, and that authority was given to him to sell the piano in question, provided he remitted the proceeds immediately to the plaintiffs, or made the sale conditional, and took from the purchaser a note similar to the one he had given, recognizing the ownership of the plaintiffs, did not operate to pass the title to Jenne. If he sold under this authority, he sold as agent for the plaintiffs. This authority to sell might have an important bearing upon the rights of a *bona fide* purchaser, to whom he might have sold and delivered the piano without notice of the limitations upon his authority. But it did not affect the question of the title of Jenne as between him or his creditors and the plaintiffs. The defendant was not a *bona fide* purchaser. He levied on the piano as the property of Jenne, and sold it after being notified of the rights of the plaintiffs, and the character of Jenne's possession. He acquired no rights superior to those of Jenne, who, as has been shown, was not, by the terms of the contract, to become the owner of the piano until his note was paid.

The judge at the circuit should have directed the jury to render a verdict for the plaintiffs, as requested (*Herring* v. *Hoppock*, 15 N. Y. 409); and the General Term were, therefore, fully justified in granting a new trial on the question of law. The order of the General Term should be affirmed, and judgment absolute rendered for the plaintiffs, with costs.

All concur.

Order affirmed and judgment accordingly.

Barnard et al. v. Campbell et al.

(55 New York, 456.—1874.)

On August 21, 1863, defendants of New York purchased of Jeffries, through his broker, 1,800 bags of linseed, and immediately mailed their notes in payment thereof to said Jeffries. On the same day, Jeffries contracted with the plaintiffs for the purchase of 1,800 bags of linseed, and, on the 24th, plaintiffs were fraudulently induced to deliver to Jeffries an order upon a warehouse for 1,370 bags, and the same were shipped to defendants by Jeffries under his contract with them. On the 29th Jeffries failed. When the linseed reached New York, plaintiffs demanded it, but defendants refused to deliver. Plaintiffs then brought action of replevin to recover possession.

Judgment was rendered in favor of plaintiffs, but was reversed by the General Term of the Supreme Court.

Allen, J. The only question involved in the action is, whether the plaintiffs and original owners or the defendants, the purchasers from Jeffries, the fraudulent vendee of the plaintiffs, have the better title to the merchandise in controversy. That, as against Jeffries, the right of the plaintiffs to rescind the sale and reclaim the goods, by reason of the fraud of the latter [former], is perfect, is conceded, and was so held upon the trial. Such right continues as against any one acquiring title under Jeffries, unless under well-recognized principles of law, and, under the circumstances of this case, Jeffries could transfer a better title than he had, or the plaintiffs, by their acts, are estopped from asserting title as against a purchaser from him.

But two questions of fact were submitted to the jury: 1. Whether the sale to Jeffries was for cash or upon credit; and, 2. If for cash, whether payment was waived and the goods delivered so as, but for the fraud, to vest the property in Jeffries.

The jury found, either that the sale was upon credit, or that the payment of the purchase-price, as a condition precedent to the delivery of the property to and the vesting of the title in Jeffries was waived, and that the delivery to him was absolute and unconditional; and the defendants had a verdict, under the in-

structions of the judge, that the equitable rule applied, that when one of two innocent parties must suffer loss by reason of the fraud or deceit of another, the loss shall fall upon him by whose act or omission the wrong-doer has been enabled to commit the fraud; and that the plaintiffs were in the position of a party who lets another have property unconditionally, and thereby enables him to sell the same and receive the purchase-price from a third person; and that in such case the purchaser takes the title. In other words, the plaintiffs were held to be estopped from claiming the goods from the defendants in case the jury found that there had been an unconditional delivery by the plaintiffs to Jeffries, notwithstanding, as the judge at the circuit expressly declared, and as the evidence showed, the defendants purchased the goods from a broker of Jeffries in New York on the twenty-first of August, and paid for them the same day by transmitting their notes to Jeffries, at Boston, who at once negotiated them; and Jeffries obtained neither the property nor any order for its delivery, or documentary evidence of title or of his purchase, until the twenty-fourth of the same month, three days after the transaction was consummated as between Jeffries and the defendants. That is, it was held at the circuit that the subsequently acquired possession of Jeffries operated by relation to create an estoppel as of the twenty-first of August, in favor of the defendants and against the plaintiffs; and the jury were in terms instructed that the defendants were purchasers in good faith, for value, and acquired a title paramount to that of the plaintiffs, and were entitled to a verdict; and they had a verdict and judgment, upon this view of their rights.

That the defendants were purchasers in good faith, that is, without notice or knowledge of the fraud of Jeffries, or of the defects in his title, for a full consideration actually paid to Jeffries, is not disputed. Both plaintiffs and defendants are alike innocent of any dishonest or fraudulent intent, and one or the other must suffer loss by the frauds of one with whom they dealt in good faith, for legitimate purposes, and with honest intention. Both were alike the victims of the same fraudulent actor, and if one rather than the other of the parties has done any act enabling the fraud to be committed, and without which it could not have been perpetrated upon the other in the exercise of ordinary care and discretion, the loss should, within the

rule before referred to, fall on that one of the parties aiding and abetting the fraud, or enabling it to be committed. But good faith, and a parting of value by the one, will not alone determine who should have the loss, or fix the ownership of the property fraudulently purchased from the one and sold to the other. The general rule is that a purchaser of property takes only such title as his seller has, and is authorized to transfer; that he acquires precisely the interest which the seller owns, and no other or greater. *Nemo plus juris ad alium transferre potest quam ipse habet.* (Broom's Leg. Max. 452.) The general rule of law is undoubted that no one can transfer a better title than he himself possesses. *Nemo dat quod non habet.* (Per Willes, J., *Whistler* v. *Forster*, 14 C. B. [N. S.] 248.) To this rule there are, however, some exceptions, and unless the defendants are within the exceptions they must abide by the title of Jeffries.

One of the recognized exceptions applies to negotiable instruments only, and depends for its existence upon the law-merchant and the reasons of public policy upon which that branch of the law rests. To make this exception available, the negotiable paper must be actually transferred by indorsement in the usual form and for value. (*Whistler* v. *Forster*, *supra*; *Muller* v. *Pondir*, 55 N. Y. 325; Story on Prom. Notes, § 120 note 1; *Calder* v. *Billington*, 15 Maine, 398; *Southard* v. *Porter*, 43 N. H. 379.) Another exception is in the case of a transfer by indorsement and delivery of a bill of lading, which is the symbol of the property itself, to a *bona fide* purchaser for value, by a consignee to whom the consignor and original owner of the goods has indorsed and delivered it. This exception is founded on the nature of the instrument, and the necessities of commerce. The bill of lading, for the convenience of trade, has been allowed to have effect at variance with the general rule of law. But this operation of a bill of lading is confined to a case where the person who transfers the right is himself in possession of the bill of lading so as to be in a situation to transfer the instrument itself, the symbol of the property transferred. (*Jenkyns* v. *Usborne*, 7 M. & G. 678; *Akerman* v. *Humphrey*, 1 C. & P. 53.)

Bills of lading differ essentially from bills of exchange and other commercial negotiable instruments; and, even possession of a bill of lading, without the authority of the owner and ven-

dor of the goods, or when obtained by fraud, will not authorize a transfer so as to defeat the title of the original owner, or affect his right to rescind the sale and stop the goods in transit. While possession of a bill of lading, or other document of like nature may be evidence of title, and in some circumstances and for some purposes equivalent to actual possession of the goods, it does not constitute title, nor of itself affect the operation of the general rule that property in chattels cannot be transferred except by one having the title or an authority from the true owner. (*Gurney* v. *Behrend*, 3 Ellis & Black, 622; *Dows* v. *Perrin*, 16 N. Y. 325; see also *Saltus* v. *Everett*, 20 Wend. 267; *Brown* v. *Peabody*, 3 Kern. 121.) Jeffries had no bill of lading from the plaintiffs, the vendors of the goods, or any document of like character transferable in the usual course of business, and the transfer and delivery of which to a purchaser for value would have operated as a symbolical delivery of the goods, and been the equivalent of an actual delivery, so as to terminate the right of the plaintiffs to rescind the sale and reclaim the goods.

Another exception to the general rule exists in the case of a sale in market overt; but as we have no markets overt, and there are no sales, public or private, known to our law, which relieve the buyer of merchandise from the rule of *caveat emptor*, as applied to the title, this exception need not be further considered.

The defendants can only resist the claim of the plaintiffs to the merchandise by establishing an equitable estoppel, founded upon the acts of the plaintiffs, and in the application of the rule applied by the judge at the circuit, by which, as between two persons equally innocent, a loss resulting from the fraudulent acts of another shall rest upon him by whose act or omission the fraud has been made possible. This rule, general in its terms, only operates to protect those who, in dealing with others, exercise ordinary caution and prudence, and who deal in the ordinary way and in the usual course of business and upon the ordinary evidences of right and authority in those with whom they deal, and as against those who have voluntarily conferred upon others the usual evidences or *indicia* of ownership of property, or an apparent authority to deal with and dispose of it. In such case, for obvious reasons, the law raises an equitable estoppel, and, as against the real owner, declares

that the apparent title and authority which exists by his act or omission shall *quoad* persons acting and parting with value upon the faith of it, stand for and be regarded as the real title and authority. It is not every parting with the possession of chattels or the documentary evidence of title that will enable the possessor to make a good title to one who may purchase from him. So far as such a parting with the possession is necessary in the business of life, or authorized by the custom of trade, the owner of the goods will not be affected by a sale by the one having the custody and manual possession. (*Dyer* v. *Pearson*, 3 B. & C. 38; *Newsom* v. *Thornton*, 6 East, 17; *Dayton* v. *Kynne*, 3 B. & A. 320; *Ballard* v. *Burgett*, 40 N. Y. 314.) But the owner must go farther, and do some act of a nature to mislead third persons as to the true position of the title. (*Pickering* v. *Busk*, 15 East, 38.)

Two things must concur to create an estoppel by which an owner may be deprived of his property, by the act of a third person, without his assent, under the rule now considered. 1. The owner must clothe the person assuming to dispose of the property with the apparent title to, or authority to dispose of it; and, 2. The person alleging the estoppel must have acted and parted with value upon the faith of such apparent ownership or authority, so that he will be the loser if the appearances to which he trusted are not real. In this respect it does not differ from other estoppels *in pais*. (*Weaver* v. *Barden*, 49 N. Y. 286; *McGoldrick* v. *Willets*, 52 id. 612; *City Bank* v. *R. W. & O. R. Co.*, 44 id. 136; *Saltus* v. *Everett*, 20 Wend. 267; *Wooster* v. *Sherwood*, 25 N. Y. 278; *Brower* v. *Peabody*, 3 Kern. 121.)

In the case before us every element of an estoppel is wanting, and no case was made for the application of the rule by which, under some circumstances, one, rather than the other [of] two innocent persons, is made to bear the loss occasioned by the fraud of a third person.

The defendants consummated their purchase from Jeffries, acting through his broker in New York, and paid for the merchandise by remitting, at his request, directly to Jeffries on the twenty-first of August, at which time Jeffries had neither the possession nor right of possession of the property, nor any documentary evidence of title or any *indicia* of ownership, or of dominion over the property of any kind. The plaintiffs had

done nothing to induce the defendants to put faith in or give credit to the claim of Jeffries of the right, to sell the property. The defendants then parted with the consideration for the purchase of the seed, not upon the apparent ownership of Jeffries, but upon his assertion of right of which the plaintiffs had no knowledge, and for which they are not responsible. Neither did the defendants at any time do or forbear to do any act in reliance upon the apparent ownership of the property by Jeffries, or induced by any act or declaration of the plaintiffs. In *Knights* v. *Wiffen*, L. R. 5 Q. B. 660, the plaintiff was induced to rest satisfied under the belief that he had acquired title to the property purchased, and so to alter his position, by abstaining from proceedings to recover back the money which he had paid to his vendor, by the declaration of the defendant that it was all right, and his promise that when the forwarding note should be received he would put the barley on the line. The defendants here at no time had any declaration or statement of the plaintiffs upon which to rely, and were not led to act or forbear to act by any documentary evidence of title in Jeffries emanating from them. There is a manifest equity in holding the owner of property estopped from asserting title as against one who, for value actually paid, has purchased it from one having, by the voluntary act or negligence of the owner, the apparent title with right of disposal, but with this limitation there is no hardship in holding to the rule that the right of property in chattels cannot be transferred unless on the ground of authority or title. Public policy requires that purchasers of property should be vigilant and cautious, at least to the extent of seeing that their vendors have some and the usual evidence of title, and if they are content to rest upon their declarations they may not impose the loss, which is the result of their own incautiousness or credulity, on another. The payment for or parting with value for the goods by the purchaser from the fraudulent vendee lays at the foundation of the estoppel, for, if he has parted with nothing, he can lose nothing by the retaking of the goods by the original owner, and that payment must be occasioned by the acts or omissions of such owner. It is the payment that creates the estoppel, and if that is not made in reliance on the acts of the owner, the latter is not and cannot, in the nature of things, be estopped.

The order granting a new trial must be affirmed, and judgment absolute for the plaintiffs.

All concur.

Order affirmed, and judgment accordingly.

BARNARD ET AL. v. CAMPBELL ET AL.

(58 New York, 73.—1874.)

ALLEN. J. The question considered by this court, and discussed in the opinion delivered on giving judgment upon this appeal was that distinctly presented by the exceptions to the ruling and decisions of the judge upon the trial, and as that was decisive and led to an affirmance of the order granting a new trial and a final judgment for the plaintiffs, it was not deemed necessary, in assigning the reasons for the judgment, to canvass particularly the argument, or review in detail the authorities cited by counsel upon a somewhat different view of the case. The entire brief, and all the authorities cited, were, nevertheless, carefully examined and considered; and, had the court adopted the views of the learned counsel for the appellants, it is possible a way might have been found to sustain the defendants' claim to the property, notwithstanding the pointed exceptions to propositions in the instructions to the jury, which were deemed erroneous. The case has been again carefully examined, and upon the theory of the counsel for the appellants, and with the aid of his very able brief, submitted upon the present motion, and the court sees no reason to interfere with the judgment already given. It is proper to say that the unusual delay in passing upon the present application has not been because of any intrinsic difficulties in the question presented, or any serious doubt as to the correctness of the former decision.

Isolated expressions may be found in elementary treatises, as well as in judicial opinions, which give color to the claim of the defendants, to hold the property in dispute as against the plaintiffs, but these were not intended to, and do not, give the rule by which this and like cases are controlled. They are all proper, in the connection in which they are found and for the

purposes for which they were used, and ought not to receive any other interpretation than such as was designed by the authors. It must be conceded that upon the delivery of the goods to Jeffries by the plaintiffs, under the circumstances, the property passed to Jeffries, and the fact that the delivery was induced by fraud did not render the contract void. It was merely voidable at the instance of the plaintiffs, who might elect to disaffirm the contract and reclaim the property. That is, the contract of sale was defeasible at the election of the plaintiffs, the vendors, if the election was seasonably made, and the goods reclaimed in proper time, after the discovery of the fraud. The plaintiffs could lose the right by delay as against the wrong-doer, if, in consequence of such delay, his position should be changed, and they would have lost it absolutely if during the interval between the delivery of the goods, the vesting of this defeasible title in the purchaser, Jeffries, and the disaffirmance of the sale by the plaintiffs, the goods had been sold to an innocent third party for a valuable consideration. The superior equity of a purchaser of property from one who has acquired a title defeasible at the election of the former owner and vendor, by reason of fraud, to that of such owner seeking to reclaim his property, is based upon the fact that acting upon the evidence of title which the owner has permitted the wrong-doer to assume and possess, he has been induced to part with value, and will be the loser because of the credit given to the apparent ownership if he is compelled to surrender the property. The mere possession by the party claiming to hold will not sustain his claim, but the circumstances under, and consideration upon which he has acquired the possession are also material. Were it otherwise, an assignee for the benefit of creditors, or one who should take as collateral security for the payment of a precedent debt, would hold as against the original owner, which is not claimed and is contrary to the whole current of authority. Several things must concur to bar the claim of the defrauded vendor. 1. He must have parted with possession of his property with intent to pass the title to the wrong-doer, thus giving him the apparent right of disposal. If property is taken feloniously or without the consent of the owner the taker can make no title to it, even to an innocent purchaser with value. 2. A third party must have acquired title from the wrong-doer without notice of the defects in his title or knowledge of circumstances to put him

to an inquiry as to the source of his title. And, 3. Such third party must have parted with value upon the faith of the apparent title of the wrong-doer, and his right to dispose of the property. If any of these elements are wanting the vendor seasonably pursuing his legal right may have his property. That this formula very closely resembles that by which an estoppel *in pais* is defined and limited is true, and this must necessarily be so, so long as the rights based upon each have the same equitable foundation. The defendants parted with no value, incurred no liability, and in no respect changed their situation in the interval between the delivery of the merchandise by the plaintiffs to Jeffries, and their disaffirmance of the contract, and reclaiming the goods. In other words, they did nothing in consequence of such delivery to Jeffries or based upon his title and possession, and are in precisely the same situation as if the goods had never left the possession of the plaintiffs. They parted with their notes and incurred obligations upon the faith of the promise and agreement of Jeffries, and upon his credit alone.

It is possible that the claim of the defendants to hold as *bona fide* purchasers for value is sustained by *Fenby* v. *Pritchard*, 2 Sandf. 151, but this case is so at war with principles recognized as well settled by this court in analogous cases, that it cannot be regarded as well decided. The cases cited from Maine and Illinois (*Lee* v. *Kimball*, 45 Me. 172; *Butters* v. *Haughwout*, 42 Ill. 18), treat the case as analogous to a transfer of negotiable paper, and hold that a precedent debt is a valuable consideration for the transfer, and gives the transferee a good title as against the former owner. This is in direct conflict with the uniform decisions in this State, from *Bay* v. *Coddington*, 5 J. Ch. 54; affirmed, 20 J. R. 637, to *Weaver* v. *Barden*, 49 N. Y. 286; affirmed, *Turner* v. *Treadway*, 53 id. 650. One other case from Maine cited by the counsel for the appellants (*Titcomb* v. *Wood*, 38 Me. 561), recognizes the necessity of a valuable consideration, as that term is understood and used by the courts of this State, as necessary to give the purchaser of property from a fraudulent vendor a superior equity and title to that of the former owner, and find such a consideration in the transfer of property before then stolen from the defendant. The court say: "Here the defendant being the owner of stolen property, with his right and title unimpaired by the felony, transferred it to McClure for the property in question, in part payment, at least. This

constituted a valuable consideration for his purchase, given at the time. Thus, it appears that he was a purchaser of the gold watch, *bona fide*, for a valuable consideration, and without notice of the fraud by which his vendor acquired it. This gives him a superior equity and a better right, and enables him to hold the property against the defrauded vendor." *Hutton* v. *Cruttwell*, 1 El. & Bl. 15, and *Mercer* v. *Peterson*, Law Rep. (2 Ex.) 304, relied upon in support of this application, presented questions under the English bankrupt acts, and merely decide that a transfer of effects, by the bankrupt, in performance of a prior executory agreement, for which a full consideration had been paid at the time of the agreement, was not within the condemnation of the act or affected by the proceedings in bankruptcy. They do not bear upon the question before us. In *Clough* v. *L. and N. W. R. Co.*, L. R. (7 Exch.) 26, the question was whether the claim to disaffirm the sale of the goods was seasonably made by the defrauded vendor. The vendor had first sought to stop the goods *in transitu*, which was an act in affirmance of the sale; but the transit was ended before notice reached the carrier. There was no act avoiding the contract on the ground of fraud done by the vendor, until the plea in the action by Clough, who was found by the jury to be cognizant of, and a party to, the fraud in the purchase. No question of consideration or the validity of any sale of the goods by the fraudulent purchaser was in the case, or considered by the court. *Disbrow* v. *McDonald*, 5 Bos. 130; *S. C. sub nom. Winne* v. *McDonald*, 39 N. Y. 233, was clearly within the rule upon the interpretation given to the transaction by the courts. It was said by the Superior Court that Perry & Co., the purchasers of the wheat, had the full possession of it in the precise manner that the contract between them and the plaintiffs contemplated, and that the purchase and possession of Perry were such as to enable him to confer upon a *bona fide* purchaser, a pledgee for value, a title valid as against the plaintiffs; and that the advance was made by the defendants after the delivery to Perry & Co. of the documentary evidence of title, and the wheat pledged as security at the time of the advance. The evidence upon the record in this court, it would seem, left the precise time when some of the occurrences took place in doubt, but that the specific wheat was pledged, at the time of the advance, was established, although possibly, the muniments of

title were not then delivered. The title and possession had vested in Perry & Co. at the time of the pledge; and that fact clearly distinguished that from the present case.

Judge Bosworth, in *Caldwell* v. *Bartlett*, 3 Duer, 341, and *Keyser* v. *Harbeck*, id. 373, recognizes the doctrine that the advance must be made or consideration parted with upon the faith of the title of one in actual possession of the property, or the written evidence of title, to give an indefeasible title as against the true owner. All the authorities are direct and to the effect that no one but a *bona fide* purchaser, or pledgee for value—that is, one who gives value for or makes advances upon goods obtained from the owner by fraud or fraudulent representation—and that he who has paid value, or made advances, or incurred responsibilities upon the credit of them, can alone claim to hold them as against such owner. (*Root* v. *French*, 13 Wend. 573; *Mowrey* v. *Walsh*, 8 Cow. 238; *Hoffman* v. *Noble*, 6 Met. 68.) There is no good reason or equity in placing the burden of a fraudulent sale upon a *bona fide* vendor rather than upon a *bona fide* purchaser from the fraudulent vendee, unless the purchaser has parted with his money, or some value, upon the credit of possession or some evidence of title in the vendee, received from the original owner, and by means of which he has induced the purchaser to treat with him as owner.

The motion for a reargument must be denied.

All concur except JOHNSON, J., not sitting.

Motion denied.

DEVOE ET AL. v. BRANDT (IMPLEADED).

(53 New York, 462.—1873.)

PECKHAM, J. Replevin in the detinet for certain goods of the value of over $600, fraudulently purchased, as is alleged by defendant Samuels, of the plaintiff, with intent to cheat plaintiff out of their value. They were subsequently found in the possession of the defendant Brandt. The defendant Samuels made default; Brandt answered, denying the complaint, and setting up, among other things, that he bought the goods at a public auction thereof as the goods of Samuels.

The case was tried at the New York circuit. It appeared, in proof, that in March, 1865, Brandt commenced an action against this Samuels for goods sold and delivered to him in 1863 and 1864, chiefly in 1863. That Samuels put in no answer, but no judgment was perfected until the 7th of November, 1866, and then for $4,078.34 damages and costs; and execution issued thereon on the same day to the sheriff of New York, which was returned on the 10th of December, 1866, satisfied to $2,712.77, and *nulla bona* as to the residue. It was shown that Samuels had been in the habit of purchasing goods of the plaintiff, to a limited extent, prior to this sale. That this sale was made, and the larger part of the goods delivered on the 26th of October, 1866, a portion on the 30th of October, and the remainder on the 8th of November following. That Samuels, at the time of the purchase by him, said nothing as to his circumstances or as to the suit then pending against him in favor of Brandt, in which the right to enter up judgment had been then due over a year and a half; evidence was also given of the replevin papers in this case, and of an undertaking given by the defendants for a return of the property replevined, before it had been delivered to plaintiff.

The defendants offered no evidence. The jury found for the plaintiff. The General Term, in the first district, granted a new trial.

It is clear that there was sufficient evidence to go to the jury upon the question whether this was a fraudulent purchase by Samuels. Here was abundant evidence for their consideration that this purchase was made with a view of cheating the plaintiff, and that he never intended to pay for the goods. He concealed from the plaintiff a fact (the right of Brandt to enter up his judgment for $4,000), which he knew to be most material, and he well knew that if plaintiff had been aware of that fact he never would have made the sale.

There is good ground for inferring, from the facts proved, that he intended to commit a fraud in this purchase, and he deliberately proceeded to its consummation. Such a fraud may be as easily consummated by a suppression of the truth as by the suggestion of a falsehood. The law is guilty of no such absurdity as to require a false affirmation as the only basis on which to prove a fraud among merchants. It is not necessary or usual for merchants to inquire of their customers as to their

pecuniary condition at each sale. The fact to be proved is that the purchase was made with intent to defraud. Any evidence that will satisfy a jury of that fact, that affords reasonable proof of such a purpose, makes a case for a jury. That evidence may be positive or circumstantial, and as various as the proof of any other fact.

The proof here is abundant; obviously the defendant, Samuels, was then wholly insolvent. The deficiency on the execution showed him able to pay only about fifty per cent of these two debts. He purchased when he knew the goods would or might be all seized and consumed upon this execution. In fact, a portion of these goods was delivered after the execution was issued. It would seem as if he bought in order to subject the goods to that execution; and he offers no explanation. (*Nichols* v. *Michael*, 23 N. Y. 264, 274; *Hennequin* v. *Naylor*, 24 id. 139; *Earl of Bristol* v. *Wilsmore*, 1 Barn. & Cr. 514.) We may assume then that these goods were fraudulently purchased. No title then passed, and the vendor can retake them from any one but a *bona fide* purchaser. Is Brandt such a purchaser? The goods are found in his possession, and it rests with him to show that he is a *bona fide* purchaser thereof. He shows nothing. He alleges in his answer that he bought them at public auction, as the goods of Samuels. But he gives no proof of that; and it would not aid him if he did, unless he showed that he paid value for them. But assume that Brandt seized these goods upon his execution and purchased them at a sale thereon, he did not thereby become a *bona fide* purchaser.

In this case, upon several grounds: First. The facts disclosed show that there was enough to put him upon inquiry as to the fraud of Samuels, even if he could otherwise become a *bona fide* purchaser (*Durrell* v. *Halley*, 7 Paige, 492, a case much like the one at bar); Second. Because the plaintiff in the execution made no advances thereat. It was not necessary, to avoid such sale, that the execution creditor knew of the fraudulent purchase (*Ash* v. *Putnam*, 7 Hill, 302; *Root* v. *French*, 13 Wend. 570; *Cary* v. *Hotailing*, 1 Hill, 311; *Atwood* v. *Dearborn*, 1 Allen, 483; *Mowrey* v. *Walsh*, 8 Cow. 238; *Acker* v. *Campbell*, 23 Wend. 372; *Earl of Bristol* v. *Wilsmore*, *supra*); Third. Because such property, so fraudulently purchased, is not the subject of levy and sale by a sheriff.

Replevin in the *cepit* will lie therefore at the suit of the defrauded vendor. (See same authorities.)

It is only necessary to decide in this case that Brandt, the execution creditor, does not become a *bona fide* purchaser by buying goods at a sale thereon which were fraudulently purchased by the defendant in that execution. That proceeding gave him no better title than a mere delivery would from the fraudulent vendee. He advanced nothing, and he lost nothing by the proceeding. The sale on the execution did not contain the first element to constitute this defendant a *bona fide* purchaser. The execution was returned unsatisfied in part. No lien was therefore relinquished, and the amount realized from a stranger's property would be stricken from the execution on application to the court. The charge of the court was therefore right.

The order of the General Term granting a new trial should be reversed, and judgment ordered upon the verdict for the plaintiff.

All concur.

Order reversed and judgment accordingly.

Barker et al. v. Dinsmore.

(72 Pennsylvania, 427.—1872.)

Action of replevin, by John Dinsmore against William Barker & Co., to recover 45 sacks of wool of the value of $3,816.25.

A man calling himself Barker, and representing himself as a cousin of one of the members of the above-mentioned firm, entered into an agreement with John Dinsmore for the purchase of the wool in question, handing Dinsmore a business card of Barker & Co., on the back of which he wrote,—"Bought of John Dinsmore 6000 pounds of wool, more or less, for 50 cents per pound, delivered in the city of Pittsburg.

"Wm. Barker & Co.,
"No. 72 Smithfield street."

The same man then went to Barker & Co., and, representing himself as Dinsmore's son, contracted to sell the wool to them.

The goods were forwarded to Pittsburg, and there delivered to the man representing himself as Dinsmore's son, and he delivered the same to Barker & Co., and received payment therefor.

Verdict for plaintiff. Defendants then took out a writ of error.

WILLIAMS, J. The verdict of the jury establishes the fact that the plaintiff below did not sell the wool to the defendants' vendor, as an individual, on his own responsibility, but as a member or agent of the defendants' firm, and upon their credit. Nor was the wool delivered to him by the plaintiff. It was delivered to the railroad company, to be carried to Pittsburg, and there delivered to defendants, to whom it was consigned by the plaintiff. Under the contract of shipment the company had no right to deliver the wool to any person except the consignees; and their delivery of it to the defendants' vendor vested in him no property or right of possession as against the plaintiff. The principle which underlies this case, and by which the rights of the parties are to be determined, is this: The sale of goods by one who has tortiously obtained their possession, without the owner's consent, vests in the purchaser no title to them as against the owner. As a general rule no man can be divested of his property without his own consent and voluntary act. It is true that there are exceptions to the rule, as clearly defined and as well settled as the rule itself, but this case does not come within any of them. Here the defendants' vendor, as we have seen, acquired no right or title to the wool under his contract with the plaintiff, and he did not obtain from him its actual possession. The railroad company had no authority, as the plaintiff's agent, to deliver the wool to him, and their delivery gave him no right or title to it whatever. Nor had he any apparent or implied authority from the plaintiff to sell or dispose of it. It is clear, then, that he could convey no title by its sale; and if so, the defendants could acquire no title by its purchase, though they purchased it for a fair and valuable consideration, in the usual course of trade, without notice of the plaintiff's ownership, or of any suspicious circumstances calculated to awaken inquiry or put them on their guard. The case is a hard one in any aspect of it. One of two innocent parties must suffer by the fraud and knavery of a swindler, who had no authority to act for either. But the law is well settled that the owner

cannot be divested of his property without his own consent, unless he has placed it in the possession or custody of another and given him an apparent or implied right to dispose of it. The case was tried on this principle, and as there is no error apparent in the record, the judgment must be affirmed.

Judgment affirmed.

RODLIFF ET AL. v. DALLINGER.

(141 Massachusetts, 1.—1886.)

REPLEVIN.

Plaintiffs were wool dealers in Boston, and had delivered the wool in question to one Clementson, a wool broker, who falsely represented that he had an offer from a manufacturer for the wool, whose name he would not disclose, but whose credit, he said, was good. The plaintiffs delivered the wool to Clementson upon the understanding that he would pay them immediately the sum he received from his principal. The plaintiffs entered the sale on their books as a sale to Clementson, who stored the wool with the defendant, a warehouseman, and pledged the warehouse receipts with the Massachusetts Loan and Trust Company as security for a loan of $2,000.

Verdict for plaintiffs; defendant alleged exceptions.

HOLMES, J. The plaintiffs' evidence warranted the conclusion that they refused to sell to Clementson, the broker, but delivered the wool to him on the understanding that it was sold to an undisclosed manufacturer in good credit with the plaintiffs. This evidence was not objected to, and was admissible, notwithstanding the fact that the sale was entered on the plaintiffs' books as a sale to Clementson, and that a bill was made to him. *Commonwealth* v. *Jeffries*, 7 Allen, 548, 564. It was admitted that Clementson, in fact, was not acting for such an undisclosed principal; and it follows that, if the plaintiffs' evidence was believed, there was no sale. There could not be one to this supposed principal, because there was no such person, and there was not one to Clementson, because none purported to be made to him, but, on the contrary, such

a sale was expressly refused and excluded. *Edmunds* v. *Merchants' Despatch Transportation Co.*, 135 Mass. 283.

It was suggested that this case differed from the one cited, because there the principal was disclosed, whereas here he was not, and that credit could not be supposed to have been given to an unknown person. We have nothing to say as to the weight which this argument ought to have with a jury, beyond observing, that the plaintiffs had reason in Clementson's representations for giving credit to the supposed manufacturer. But there is no rule of law that makes it impossible to contract with or sell to an unknown but existing party. And if the jury find that such a sale was the only one that purported to be made, the fact that it failed does not turn it into a sale to the party conducting the transaction. *Schmaltz* v. *Avery*, 16 Q. B. 655, only decides that a man's describing himself in a charter-party as "agent of the freighter" is not sufficient to preclude him from alleging that he is the freighter. It does not hint that the agent could not be excluded by express terms, or by the description of the principal, although insufficient to identify the individual dealt with, as happened here; still less, that in favor of third persons the agent would be presumed without evidence to be the undisclosed principal, although expressly excluded.

The invalidity of the transaction in the case at bar does not depend upon fraud, but upon the fact that one of the supposed parties is wanting, it does not matter how. Fraud only becomes important, as such, when a sale or contract is complete in its formal elements, and therefore valid unless repudiated, but the right is claimed to rescind it. It goes to the motives for making the contract, not to its existence; as when a vendee expressly or impliedly represents that he is solvent and intends to pay for goods, when in fact he is insolvent, and has no reasonable expectation of paying for them; or, being identified by the senses and dealt with as the person so identified, says that he is A., when in fact he is B. But when one of the formal constituents of a legal transaction is wanting, there is no question of rescission; the transaction is void *ab initio*, and fraud does not impart to it, against the will of the defrauded party, a validity that it would not have if the want were due to innocent mistake.

The sale being void, and not merely voidable, or, in simpler words, there having been no sale, the delivery to Clementson

gave him no power to convey a good title to a *bona fide* purchaser. He had not even a defective title, and his mere possession did not enable him to pledge or mortgage. The considerations in favor of protecting *bona fide* dealers with persons in possession, in cases like the present, were much urged in *Thacher* v. *Moors*, 134 Mass. 156, but did not prevail. Much less can they be allowed to prevail against a legal title, without the intervention of statute.

Exceptions overruled.

Part IV.

WARRANTY.

Dorr v. Fisher.

(1 Cushing, 271.—1848.)

Action to recover the price of two tubs of butter.

In November, 1845, the plaintiff offered several kegs of butter for sale to the defendant. On examining the butter (two or three kegs only) the defendant told the plaintiff that he had been smoking and was therefore unable to decide whether the butter was good or not, but that he wanted it of first-rate quality. The plaintiff then said that he called it first-rate, and the defendant replied that if it was good, the plaintiff might leave him two tubs. The two tubs were delivered, in the course of the day, at the defendant's store.

The principal question was, whether the butter was of a good quality, and much evidence upon this point was introduced on both sides.

The defendant contended that the butter was sold under a warranty that it was of the best quality, and that the burden of proof was on the plaintiff to show that it was of such a quality. But the trial judge instructed the jury, that if the butter was sold with a warranty as to quality, or with a representation amounting to a warranty, the burden of proof was upon the defendant to show, that it was not equal to the warranty or representation. The jury returned a verdict for the plaintiff, and the defendant filed exceptions.

Shaw, C. J. This cause has been argued, on the part of the defendant, as if the suit were brought upon an open, unexecuted contract for the purchase of goods; whereas the declaration is in indebitatus assumpsit for goods sold and delivered. To maintain this action, it is not necessary to set out the contract

of sale, with its conditions and limitations; it is enough to prove an agreement for a sale of the goods, at a fixed price in money, or without a price, (in which case, the law implies an agreement to pay so much as they are worth,) and an actual delivery, whereby a debt arises. A delivery by the vendor implies an acceptance by the vendee. An offer, by the vendor, not accepted by the vendee, may be a good tender, and a good performance on his part, but it is not a delivery. If there are conditions annexed to the agreement of sale, respecting the quality, or other circumstances, which are not complied with by the vendor, the vendee should decline to accept the goods; but, if he does accept them, the acceptance is a waiver. And, so, in an indebitatus assumpsit, for goods sold and delivered, the plaintiff must prove a delivery, or he will fail in the action. And this is not confined to the case of an implied assumpsit, on a *quantum valebat;* if the sale be made by an express contract, not under seal, and the goods are actually delivered, it is sufficient to allege that the defendant is indebted to the plaintiff for goods sold and delivered, and the law implies a promise to pay. No matter, therefore, what may have been the terms and conditions, under which goods are sold and delivered; if nothing remain but the obligation to pay for them, this is a debt, the existence of which supports the allegation of being indebted, and supersedes the necessity of setting out specially such terms and conditions.

"Where goods have been sold and actually delivered to the defendant, though under a special agreement, it is in general sufficient to declare on the indebitatus count, provided the contract were to pay in money, and the credit be expired." 1 Chit. Plead. 338.

This is not a mere technical rule of pleading, but a sound rule of law and justice, growing out of the nature of a sale. Were it otherwise, and were the plaintiff, after a delivery of goods on a contract of sale, bound to prove the terms and conditions of such sale, and to prove affirmatively that he had complied with those conditions, on his part, the result would be, that the vendee, having accepted the goods, as and for the goods contracted for, and without offering to return them, or giving notice to the vendor, to come and take them back, might hold and retain the goods, without paying anything for them. The vendor could not recover them back in an action, because

he has delivered them to the vendee, in pursuance of a contract, as his own.

It is asked, then, has the vendee no remedy against the vendor, after delivery, if the vendee fails to derive the benefits, expected and stipulated for on the sale? Certainly not. If he has been deceived, as to the title, quality, or character of the thing purchased, he may rescind the contract, restore or tender back the goods, and recover back the purchase money; or he may be secured by a warranty on the sale. The law, on the sale of personal property, implies a warranty of good title, so that if the vendee be deprived of his purchase by a paramount title, he has a remedy on his warranty. Or he may take an express warranty, as to the quality, condition, value, age, origin, or other circumstances respecting the thing sold. But a warranty is a separate, independent, collateral stipulation, on the part of the vendor, with the vendee, for which the sale is the consideration, for the existence or truth of some fact, relating to the thing sold. It is not strictly a condition, for it neither suspends nor defeats the completion of the sale, the vesting of the thing sold in the vendee, nor the right to the purchase money in the vendor. And, notwithstanding such warranty, or any breach of it, the vendee may hold the goods, and have a remedy for his damages by action.

But, to avoid circuity of action, a warranty may be treated as a condition subsequent, at the election of the vendee, who may, upon a breach thereof, rescind the contract, and recover back the amount of his purchase money, as in case of fraud. But, if he does this, he must first return the property sold, or do everything in his power requisite to a complete restoration of the property to the vendor, and, without this, he cannot recover. *Conner* v. *Henderson*, 15 Mass. 319; *Kimball* v. *Cunningham*, 4 Mass. 502; *Perley* v. *Balch*, 23 Pick. 283. Such a restoration of the goods, and of all other benefits derived from the sale, is a direct condition, without a compliance with which, the vendee cannot rescind the contract, and recover back the money or other property, paid or delivered on the contract.

But his other remedy is by an action on the warranty, or contract of the vendor, on which, if there be a breach, he will recover damages to the amount of the loss sustained by the breach, whatever that may be. If it be a warranty of the quality of goods, and the breach alleged is, that the goods delivered were

inferior to the goods stipulated for, the damage will ordinarily be the difference in value between the one and the other. Such an action affirms instead of disaffirming the contract of sale, leaves the property in the vendee, and gives damages for the breach of such separate, collateral contract of warranty.

This remedy is so familiar, that it scarcely requires to be supported and explained by authorities. But it naturally requires an action to be brought by the vendee against the vendor, which, if the vendor is at the same time suing for the price, is a cross action.

But the general tendency of modern judicial decisions has been, to avoid circuity and multiplicity of actions, by allowing matters growing out of the same transaction to be given in evidence by way of defense, instead of requiring a cross action, when it can be done without a violation of principle, or great inconvenience in practice.

And it has lately been decided, in this court, after consideration and upon a review of the authorities, that, when a cross action will lie for a deceit in the sale of a chattel, the deceit may be given in evidence in reduction of the damages, in a suit for the purchase money. *Harrington* v. *Stratton*, 22 Pick. 510. And the principles, which govern that case, are precisely applicable to the case, where a cross action will lie to recover damages on a breach of warranty on a sale, and the same may be given in evidence, and a like amount deducted from the purchase money, in assessing damages in a suit by the vendor for the price. *Poulton* v. *Lattimore*, 9 B. & Cr. 259; *Perley* v. *Balch*, 23 Pick. 283.

It appears by the report in the present case, that these are the principles on which the trial of the action proceeded. The plaintiff must first have proved a sale and delivery of the two tubs of butter. Some objection was made to the plaintiff's account book; but it was not alluded to in the argument. Indeed, the other proof tends to show, that the defendant agreed to take the two tubs of butter, and directed the plaintiff to leave them at his store, which the plaintiff did the same day. No offer was made afterwards to return the butter. No notice was given to the defendant to take it away. This was evidence, from which a jury might well infer a sale and delivery. The only way, then, in which the defendant could avail himself of proof of warranty of quality, and a breach of it, was in

obtaining a reduction of damages, by way of set-off, in nature of a cross action, and as a substitute therefor. Had the defendant brought his action, it is quite clear, that the burden of proof would have been on him to prove such warranty and breach, and the damage sustained by it. The burden was on him in the same manner, when he resorted to this line of defense, as a substitute for a cross action. We are of opinion, therefore, that the direction of the judge was strictly correct, that if the article was sold to the defendant with a warranty as to its quality, or with a representation amounting to a warranty, the burden of proof was on the defendant, to show that it was not equal to the warranty.

Exceptions overruled and judgment on the verdict.

CHAPMAN v. MURCH.

(19 Johnson, 290.—1822.)

IN error to the court of common pleas of *Washington* county, New York. *Chapman* brought an action of *assumpsit* against *Murch* in the Court below. The declaration stated, that the defendant, on the 1st of December, 1818, in consideration that the plaintiff would deliver to the defendant, a certain horse of the plaintiff of great value, in exchange for a certain horse of the defendant, the defendant undertook and promised, that the horse of the defendant was then and there sound, etc.; that the plaintiff, confiding in the said promise of the defendant, delivered to him the said horse of the plaintiff, in exchange for the defendant's horse, etc. Yet the defendant, etc., fraudulently, etc., did not perform or regard his said promise, etc., for that the horse of the defendant was not sound, but, on the contrary, was unsound, and had a certain disease, called the yellow water, of which he afterwards, to wit, on the 2d day of *December*, 1818, died, whereby, etc. The defendant pleaded the general issue, and on the trial of the cause, the plaintiff offered to prove, that the parties exchanged horses; that the plaintiff let the defendant have a horse worth $100, in consideration of which the defendant let the plaintiff have another horse, which the defendant, at the time, represented to be sound; that the horse

of the defendant, so delivered to him in exchange, was not sound, but that he had the disease, called the yellow water, which rendered him useless and of no value, and that he died the next day. The evidence so offered was objected to by the defendant's counsel, and rejected by the Court, on the ground, that this being an action of *assumpsit* founded on a warranty of the soundness of the horse, the plaintiff, in order to entitle himself to a recovery, was bound to prove an *express warranty*, and that the testimony offered by the plaintiff did not amount to such a warranty. A bill of exceptions was taken to the opinion of the Court, on which the writ of error was brought.

SPENCER, Ch. J. In the various cases which have been cited, it appears, abundantly, that when the action is founded on a warranty of the soundness of a chattel sold, a warranty must be proved; but it nowhere appears, that it is necessary that the vendor should use the express words, that he warranted the soundness. If a man should say, on the sale of a horse, "I promise you the horse is sound," it is difficult to conceive, that this is not a warranty, and an express one too. Peake on Evid. 228, says, "in an action on a warranty, the plaintiff must prove the sale and warranty." "In general, (he says,) any representation made by the defendant of the state of the thing sold, at the time of the sale, will amount to a warranty." He adds, "but where the defendant refers to any document, or to his belief only, in such cases no action is maintainable, without proof, that he knew he was representing a falsehood." In every action on a warranty, it must be shown that there was an express and direct affirmation of the quality and condition of the thing sold, as contradistinguished from opinion, etc., and when that is made out, it would be an anomaly to require that the word *warrant* should be used. Any words of equivalent import, showing the intention of the parties, that there should be a warranty, will suffice. In the present case, the plaintiff offered to prove what, under the circumstances, might be an express warranty; and that was for the consideration of the jury, under the advice of the Court. 2 Caines, 56; 3 Term Rep. 57; 10 Johns. Rep. 484.

The judgment must be reversed, and a *venire de novo* awarded to the Court below.

Judgment reversed.

HAWKINS v. PEMBERTON ET AL.

(51 New York, 198.—1872.)

CERTAIN auctioneers sold for the plaintiff 23 barrels of what was stated by the auctioneer, at the time and in the presence of the plaintiff, to be "blue vitriol, sound and in good order." Defendants became the purchasers at eight cents per pound, took a sample away with them, and the next day, finding that its surface had turned nearly white from exposure to the air, notified the plaintiff that they would not accept said barrels. The true character of the article could not be determined by inspection, but it was subsequently analyzed and found to contain only from seventeen to twenty-five per cent of blue vitriol (*sulphate of copper*), the remainder being green vitriol (*sulphate of iron*). On the refusal of defendants to take, plaintiff sold said barrels on their account, and now sues to recover damages for breach of contract of purchase. Defense, breach of warranty of quality, also fraud. The court directed a verdict for plaintiff, and was sustained by the General Term of the Superior Court of the city of New York.

EARL, C. This action was brought against the defendants as purchasers of an article called, at the time of the sale, blue vitriol, to recover damages for refusing to take and pay for the same, and upon the trial the court refused to submit the evidence to the jury and ordered a verdict for the plaintiff.

The defendants failed to establish their defense of fraud, and upon that question I think there was no evidence to submit to the jury. We have only, therefore, to consider whether there was evidence tending to show that the plaintiff at the sale warranted the article to be blue vitriol, sound and in good order, and whether there was a breach of this warranty.

It is unquestioned that there was a warranty that the article was sound and in good order, and I am quite clear that there was no breach of this warranty. It was good, sound saltzburger or mixed vitriol. It was just as it was made; not damaged, or in any way out of order. It was in its natural, normal condition, and it could not be said of such an article that it was unsound.

Did the plaintiff warrant the article to be blue vitriol? It is unquestioned that at the time of the sale, through his auctioneer, he represented it to be blue vitriol, and that the defendants bought it as such, relying upon that representation. To constitute a warranty, it is not necessary that the word warranty should be used. It is a general rule that whatever a seller represents, at the time of a sale, is a warranty. (*Wood* v. *Smith*, 4 Car. & Payne, 45.)

In *Stone* v. *Denny*, 4 Metcalf, 151, it is said that the courts in their later decisions "manifested a strong disposition to construe liberally, in favor of the vendee, the language used by the vendor in making any affirmation as to his goods, and have been disposed to treat such affirmations as warranties whenever the language would reasonably authorize the inference that the vendee so understood it."

In *Oneida Manufacturing Society* v. *Lawrence*, 4 Cowen, 440, Chief Justice Savage says: "There is no particular phraseology necessary to constitute a warranty. The assertion or affirmation of a vendor concerning the article sold must be positive and unequivocal. It must be a representation which the vendee relies on, and which is understood by the parties as an absolute assertion, and not the expression of an opinion." And generally, where the representation is not in writing, the question of warranty is to be submitted to the jury. (*Duffee* v. *Mason*, 8 Cowen, 25.)

It is not true, as sometimes stated, that the representation, in order to constitute a warranty, must have been intended by the vendor, as well as understood by the vendee, as a warranty. If the contract be in writing and it contains a clear warranty, the vendor will not be permitted to say that he did not intend what his language clearly and explicitly declares; and so if it be by parol, and the representation as to the character or quality of the article sold be positive, not mere matter of opinion or judgment, and the vendee understands it as a warranty, and he relies upon it and is induced by it, the vendor is bound by the warranty, no matter whether he intended it to be a warranty or not. He is responsible for the language he uses, and cannot escape liability by claiming that he did not intend to convey the impression which his language was calculated to produce upon the mind of the vendee.

Here it is not questioned that the language used was suffi-

cient to constitute a warranty that the article sold was sound and in good order; and why should it not as well extend to the character of the article? When a buyer purchases an article whose true character he cannot discover by any examination which it is practicable for him to make at the time, why may he not rely upon the positive representation of the seller as to its character as well as to its quality and condition? I can discover no distinction in principle in the two kinds of representation; and yet it is claimed in behalf of the plaintiff that there is a distinction, and certain cases are cited to uphold it, which I will proceed briefly to consider.

The first is the celebrated case of *Chandelor* v. *Lopus*, Cro. Jac. 4. That was an action upon the case; and the plaintiff alleged in his declaration that the defendant sold him a stone which he affirmed to be a bezoar stone, whereas it was not a bezoar stone. The defendant pleaded not guilty, and the plaintiff had a verdict. The case was taken by writ of error to the Exchequer Chamber, and it was there held that the declaration was not good; "for the bare affirmation that it was a bezoar stone, without warranting it to be so, is no cause of action." The court say: "Every one, in selling his wares, will affirm that his wares are good, or the horse which he sells is sound; yet if he does not warrant them to be so there is no cause of action." This was the reason assigned for the decision. It was not denied that the defendant would have been liable if he had warranted the stone; but a mere affirmation was held not to be a warranty. No distinction was made between an affirmation as to the character of an article and an affirmation as to its condition or quality. The doctrine laid down is that a mere affirmation or representation as to the character or quality of goods sold will not constitute a warranty; and that doctrine has long since been exploded, and the case itself is no longer regarded as good law in this country or England. (Hilliard on Sales, 237, note; 2 Kent's Com. [Comstock's ed.] 633, note *a*; 2 Smith's Leading Cases [5th Am. ed.], 238; *Bradford* v. *Manly*, 13 Mass. 139; *Stone* v. *Denny*, 4 Metcalf, 151.)

The case of *Seixas* v. *Woods*, 2 Caines, 48, seems to have been decided mainly upon the authority of the case of *Chandelor* v. *Lopus*. That was an action on the case for selling *peachum* wood for *brozelletto*; the former worth hardly any-

thing, the latter of considerable value. The defendant advertised the wood as *brozelletto*, showed plaintiffs the invoice in which it was so described, and billed it to the plaintiffs as such. The plaintiffs had a verdict, subject to the opinion of the court; and the court held that there was no express warranty, and that the defendant was not, therefore, liable. There was no intimation in the opinion delivered that there was any difference between a warranty as to the character of an article sold and a warranty as to its condition and quality. The court simply held that the representations on the part of the defendant did not amount to an express warranty. They were hardly laying down broadly the common-law doctrine of *caveat emptor*, and combating the implied warranties of the civil law. Hence great stress was laid upon the requirement of an *express* warranty. The rule, as thus laid down, has been thoroughly overturned since the courts hold that any positive affirmation or representation as to the character or quality of an article sold may constitute a warranty. The case has been much questioned, and can no longer be regarded as authority for the precise point decided. (2 Kent's Com. [Comstock's ed.] 633; *Stone* v. *Denny*, 4 Metcalf, 151; *Henshaw* v. *Robins*, 9 Metcalf, 83, 89; *Binnard* v. *Spring*, 42 Barb. 470; *Hart* v. *Wright*, 17 Wend. 267, 271; *Bonekins* v. *Bevan*, 3 Serg. & R. 37.) The case holds that a vendor is liable upon an express warranty of the character of the article sold; and the more recent cases hold that a positive affirmation, understood and relied upon as such by the vendee, is an express warranty.

The case of *Swett* v. *Colgate*, 20 John. 196, is quite analogous to the case of *Seixas* v. *Woods*, and was decided mainly upon the authority of that case. The defendants purchased at auction, goods invoiced, advertised and sold as *barillo*, when in fact it was *kelp*, a much inferior article. It came before the Supreme Court upon a case containing the facts; and the court, exercising the province of a jury, drew the inference from all the facts of the case that there was no warranty, laying down, however, the rule that if there had been a warranty, the vendors would have been liable. No intimation is contained in the case that there is any difference between an affirmation by the vendor as to the character of the article sold and one as to its quality or condition. Upon the same state of facts, as the law is now

settled, it would be a question of fact for the jury whether or not there was a warranty.

The cases of *Seixas* v. *Woods* and of *Swett* v. *Colgate* have been frequently cited in our courts, and have doubtless influenced, and it may be controlled, the decisions in other cases. The propositions of law announced in them are sufficiently correct; but in view of the rules of law, as now settled in this and other States, I am of opinion that the law was not properly applied to the facts appearing in those cases.

Here there was a positive representation that the article sold was blue vitriol; the plaintiff meant the purchasers to understand that it was blue vitriol, and he sold it as such. The defendants relied upon the representation, believing it to be blue vitriol, and bought it as such. If upon these facts the court was not authorized to hold as matter of law that there was a warranty, it was at least bound to submit the question of warranty to the jury.

In *Allan* v. *Lake*, 18 Adolphus & Ellis, N. R. 561, the defendants sold plaintiff a parcel of turnip seed and gave them a sold note, in which it was described as "Skirving's Swedes." It proved not to be such, but of an inferior and spurious kind. The Court of Queen's Bench held that the statement in the sold note was not mere representation or matter of description, but that it amounted to a warranty that the seed was Skirving's Swedes.

In *Bridge* v. *Main*, 1 Starkie, N. P. 505, the defendant sold to the plaintiff a quantity of scarlet cuttings intended for the Chinese market, and which were understood among merchants to mean cuttings of cloth only, without mixture of serge or other materials; and it was proved that the article sold contained a quantity of serge, and that a part consisted of much smaller shreds than that usually sent to China, and that it would be very unprofitable, if not wholly unsalable. There was no special warranty, but it appeared that in the bill of parcels the goods were described as scarlet cuttings, and Lord Ellenborough ruled if they were sold by the name of scarlet cuttings and were so described in the invoices, an undertaking that they were such must be inferred.

In *Power* v. *Barham*, 4 Adol. & Ellis, 473, the action was for breach of warranty in the sale of pictures. It was proved, among other things, that the defendant, at the time of the sale,

gave the following bill of parcels: "Four pictures, views in Venice. Canalletto. £160." The judge left it to the jury, upon this and the rest of the evidence, whether the defendant had contracted that the pictures were those of the artist named, or whether his name had been used merely as matter of description or intimation of opinion. The jury found for the plaintiff, saying that the bill of parcels amounted to a warranty. The King's Bench held that the question of warranty was rightly left to the jury, and that the verdict should not be disturbed. Lord Denman says: "It was for the jury to say, under all the circumstances, what was the effect of the words, and whether they implied a warranty of genuineness, or conveyed only a description or an expression of opinion."

In *Bonekins* v. *Bevan*, 3 Serg. & Rawle, 37, Rogers, J., says: "From a critical examination of all the cases, it may be safely ruled that a sample or description in a sale note, advertisement, bill of parcels or invoice is equivalent to an express warranty that the goods are what they are described or represented to be by the vendor."

In *Bradford* v. *Manly*, 13 Mass. 144, Chief Justice Parker refers to a case which came before him at *nisi prius*, of which he says: "An advertisement appeared in the papers, which was published by a very respectable mercantile house, offering for sale good Caraccas cocoa. The plaintiff made a purchase of a considerable quantity and shipped it to Spain, having examined it at the store before he purchased; but he did not know the difference between Caraccas and other cocoa. In the market to which he shipped it there was a considerable difference in value in favor of Caraccas. It was proved that the cocoa was of the growth of some other place, and that it was not worth so much in that market. I held that the advertisement was equal to an express warranty, and the jury gave damages accordingly. The defendants had eminent counsel, and they thought of saving the question, but afterwards abandoned it and suffered judgment to go."

In *Henshaw* v. *Robins*, 9 Metcalf, 83, it was held, in a case quite analogous to the one now under consideration, that where a bill of parcels is given upon a sale of goods, describing the goods or designating them by a name well understood, such bill is to be considered as a warranty that the goods sold are what they are thus described or designated to be; and that

this rule applies, though the goods are examined by the purchaser at or before the sale, if they are so prepared, and present such an appearance as to deceive a skillful dealer. It can make no difference that, in most of the cases cited, the description of the article sold was contained in a sale note or bill of sale. The same affirmation made orally must, upon principle, have the same force and effect.

I, therefore, reach the conclusion, both upon principle and authority, that upon the facts of this case a jury might properly have inferred that there was, upon the sale, a warranty that the article sold was blue vitriol. It was, at least, the duty of the court to have submitted the question of warranty to the jury. I think the facts were so clear and undisputed that the court could, without error, have decided, as a question of law, that there was a warranty, but this it is unnecessary to decide upon this appeal.

The only remaining question to be considered is, whether there was a breach of this warranty, and this can need but little discussion. The article sold, if it was known at all in market, was known by another name. It had only from seventeen to twenty-five per cent of blue vitriol in it. It was not an inferior article of blue vitriol, but a different substance with a small admixture of blue vitriol.

The judgment should, therefore, be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

MORLEY v. ATTENBOROUGH.

(3 Exchequer, 500.—1849.)

ASSUMPSIT. The first count of the declaration stated, that in consideration that the plaintiff would buy of the defendant a harp for £15, 15 s., the defendant promised that he had lawful right and title to sell it to the plaintiff; that the plaintiff bought the harp and paid for the same. Breach, that the defendant had not lawful right or title to sell the harp. There

was also a count for money had and received to the plaintiff's use. Plea, non assumpsit.

In 1839, one Poley hired a harp of Messrs. Chappell, music-sellers, pledged it with defendant, a pawnbroker, for £15, 15 s., on the terms that, if the sum advanced were not repaid within six months, the defendant should be at liberty to sell it. The defendant had no knowledge that the harp did not belong to said Poley. The harp was not redeemed at the stipulated time, and in 1845 it was sent with other articles to be sold at auction. The harp at the auction sale was knocked down to the plaintiff for £15, 15 s., but no warranty of title was given with it. Subsequently the Messrs. Chappell discovered the harp in plaintiff's possession, sued him to recover, whereupon he gave up the harp, and paid the costs, for which, together with the price of the harp, the present action was brought.

PARKE, B. This case was argued some time ago before my Lord Chief Baron, my Brothers Rolfe, Platt, and myself, and stood over for our consideration. The plaintiff brought an action of assumpsit, stating that in consideration that the plaintiff would buy a harp for a certain sum, the defendant promised that he, the defendant, had lawful right to sell it, and the breach assigned was that he had not.

It appeared on the trial, before my Brother Platt, that the defendant, who was a pawnbroker, had the harp pledged with him in the way of his business, and, the time having elapsed for its redemption, and the pledge being unredeemed, offered it for sale through certain auctioneers, who sold it to the plaintiff. It turned out that the harp had been pledged to the defendant by a person who had no title to it, and the real owner obliged the plaintiff to give it up, after it had been delivered to him by the defendant. But, of the want of title of the pawner to it, the defendant was ignorant, and there was no express warranty. My Brother Platt directed a verdict for the plaintiff, reserving leave to move to enter a nonsuit.

On showing cause, the case was fully argued, and every authority cited and commented upon on both sides, bearing on the question, whether there is an implied warranty of title in the contract of sale of an article, or under what circumstances there is a liability on the part of the vendor to make good a loss by defect of title.

It is very remarkable that there should be any doubt, as that, certainly, is a question so likely to be of common occurrence, especially in this commercial country. Such a point, one would have thought, would not have admitted of any doubt. The bargain and sale of a specific chattel, by our law (which differs in that respect from the civil law), undoubtedly transfers all the property the vendor has, where nothing further remains to be done according to the intent of the parties to pass it. But it is made a question, whether there is annexed by law to such a contract, which operates as a conveyance of the property, an implied agreement on the part of the vendor, that he has the ability to convey. With respect to *executory* contracts of purchase and sale, where the subject is unascertained, and is afterwards to be conveyed, it would probably be implied that both parties meant that a good title to that subject should be transferred, in the same manner as it would be implied, under similar circumstances, that a merchantable article was to be supplied. Unless goods, which the party could enjoy as his own, and make full use of, were delivered, the contract would not be performed. The purchaser could not be bound to accept if he discovered the defect of title before delivery, and if he did, and the goods were recovered from him, he would not be bound to pay, or, having paid, he would be entitled to recover back the price, as on a consideration which had failed. But when there is a bargain and sale of a specific ascertained chattel, which operates to transmit the property, and nothing is said about title, what is the legal effect of that contract? Does the contract necessarily import, unless the contrary be expressed, that the vendor has a good title? or has it merely the effect of transferring such title as the vendor has? According to the Roman law (*vide* Domat. Book 1, tit. 2, s. 2, art. 3), and in France (Code Civil, chap. 4, sec. 1, art. 1603), and Scotland, and partially in America (1 Johns. Rep. 274, Broom's Maxims, 628, where this subject is well discussed), there is always an implied contract that the vendor has the right to dispose of the subject which he sells (Bell on Sale, 94); but the result of the older authorities is, that there is by the law of England no warranty of title in the actual contract of sale, any more than there is of quality. The rule of *caveat emptor* applies to both; but if the vendor knew that he had no title, and concealed that fact, he was always held responsible to the pur-

chaser as for a fraud, in the same way that he is if he knew of the defective quality. This rule will be found in Co. Litt. 102*a*; 3 Rep. 22*a*; Noy, Max. 42; Fitz. Nat. Brev. 94, *c*, in *Springwell* v. *Allen*, Aleyn, 91, cited by Littledale, J., in *Early* v. *Garrett*, 9 B. & C. 932, and in *Williamson* v. *Allison*, 2 East, 449, referred to in the argument. The same principle applies to transfer by deed. Lord Hale says, "Though the words 'assign, set over, and transfer,' do not amount to a covenant against an eigne title, yet as against the covenantor himself, it will amount to a covenant against all claiming under him:" (*Deering* v. *Farrington*, 3 Keb. 304, which was an assignment of a chose in action).

It may be, that as in the earlier times the chief transactions of purchase and sale were in markets and fairs, where the *bona fide* purchaser without notice obtained a good title as against all except the Crown (and afterwards a prosecutor, to whom restitution is ordered by the 21 Hen. 8, c. 11), the common law did not annex a warranty to any contract of sale. Be that as it may, the older authorities are strong to show that there is no such warranty implied by law from the mere sale. In recent times a different notion appears to have been gaining ground (see note of the learned editor to 3 Rep. 22, *a*); and Mr. Justice Blackstone says, "In contracts for sale it is constantly understood that the seller undertakes that the commodity he sells is his own;" and Mr. Woddeson, in his Lectures, vol. 2, p. 415, goes so far as to assert that the rule of *caveat emptor* is exploded altogether, which no authority warrants.

At all times, however, the vendor was liable if there was a warranty *in fact;* and at an early period, the affirming those goods to be his own by a vendor in possession, appears to have been deemed equivalent to a warranty. Lord Holt, in *Medina* v. *Stoughton*, 1 Salk. 210; Ld. Raym. 593, says, that "where one in possession of a personal chattel sells it, the bare affirming it to be his own amounts to a warranty;" and Mr. Justice Buller, in *Pasley* v. *Freeman*, 3 T. R. 57, disclaims any distinction between the effect of an affirmation, when the vendor is in possession or not, treating it as equivalent to a warranty in both cases.

Some of the text writers drop the expression of "warranty" or "affirmation," and lay down in general terms, that if a man sells goods *as his own*, and the title is deficient, he is liable to

make good the loss, 2 Black. Com. 451; the commentator cites, for that position, Cro. Jac. 474, and 1 Roll. Abr. 70, in both which cases there was an allegation that the vendor *affirmed* that he had a title, and therefore it would seem, that the learned author treated the expression "selling as his own," as equivalent to an affirmation or warranty. So Chancellor Kent, in 2 Com. 478, says, "that in every sale of a chattel, if the possession be in another, and there be no covenant or warranty of title, the rule of *caveat emptor* applies, and the party buys at his peril; but if the seller has possession of the article, *and he sells it as his own*, and for a fair price, he is understood to warrant the title." From the authorities in our law, to which may be added the opinion of the late Lord Chief Justice Tindal, in *Ormrod* v. *Huth*, 14 M. & W. 664, it would seem that there is no implied warranty of title on the sale of goods, and that if there be no fraud, a vendor is not liable for a bad title, unless there is an express warranty, or an equivalent to it, by declarations or conduct; and the question in each case, where there is no warranty in express terms, will be, whether there are such circumstances as to be equivalent to such a warranty. Usage of trade, if proved as a matter of fact, would, of course, be sufficient to raise an inference of such an engagement; and without proof of such usage, the very nature of the trade may be enough to lead to the conclusion, that the person carrying it on must be understood to engage that the purchaser shall enjoy that which he buys, as against all persons. It is, perhaps, with reference to such sales, or to executory contracts, that Blackstone makes the statement above referred to.

Similar questions occur in cases as to the quality of goods, in which it is clear there is, by law, no implied warranty; yet, if goods are ordered of a tradesman, in the way of his trade, for a particular purpose, he may be considered as engaging that the goods supplied are reasonably fit for that purpose. We do not suppose that there would be any doubt, if the articles are bought in a shop professedly carried on for the sale of goods, that the shopkeeper must be considered as warranting that those who purchase will have a good title to keep the goods purchased. In such a case the vendor sells "as his own," and that is what is equivalent to a warranty of title. But in the case now under consideration, the defendant can be made responsible only as on *a sale of a forfeited pledge eo nomine*. Though the harp may

not have been distinctly stated in the auctioneer's catalogue to be a forfeited pledge, yet the auctioneer had no authority from the defendant to sell it except as such. The defendant, therefore, cannot be taken to have sold it with a more extensive liability than such a sale would have imposed upon him; and the question is, whether, on such a sale, accompanied with possession, there is any assertion of an absolute title to sell, or only an assertion that the article has been pledged with him, and the time allowed for redemption has passed. On this question we are without any light from decided cases.

In our judgment, it appears unreasonable to consider the pawnbroker, from the nature of his occupation, as undertaking anything more than that the subject of sale is a pledge and irredeemable, and that he is not cognizant of any defect of title to it. By the statute law (see 1 Jac. 1, c. 21), he gains no better title by a pledge than the pawner had; and as the rule of the common law is, that there is no implied warranty from the mere contract of sale itself, we think, that where it is to be implied from the nature of the trade carried on, the mode of carrying on the trade should be such as clearly to raise that inference. In this case we think it does not. The vendor must be considered as selling merely the right to the pledge which he himself had; and therefore we think the rule must be absolute.

Since the argument, we find that there was a count for money had and received, as well as the count on the warranty, in the declaration. But the attention of the Judge at the trial was not drawn to this count, nor was it noticed on the argument in court.

It may be, that though there is no implied warranty of title, so that the vendor would not be liable for a breach of it to unliquidated damages, yet the purchaser may recover back the purchase-money, as on a consideration that failed, if it could be shown that it was the understanding of both parties that the bargain should be put an end to if the purchaser should not have a good title. But if there is no implied warranty of title, some circumstances must be shown to enable the plaintiff to recover for money had and received. This case was not made at the trial, and the only question is, whether there is an implied warranty.

Rule absolute.

BURT v. DEWEY.

(40 New York, 283.—1869.)

ACTION to recover damages for the breach of an implied warranty of title.

In December, 1852, plaintiff bought a horse of defendant and paid him $80.00 therefor, and subsequently sold the horse to other parties. At the time of said purchase, one Dysart was the owner of the horse, and, in 1856, he sued plaintiff for its conversion, and recovered judgment for its value, but the judgment was not enforced.

JAMES, J. The evidence was sufficient to show that the horse had been stolen from Dysart before he came to the possession of defendant, and therefore, as against Dysart, defendant and his vendees were without title.

In the sale from defendant to plaintiff there was no proof of any express warranty of title; nor was any such proof necessary. The fair and reasonable construction of the evidence is that defendant had possession of the property at the time of sale and transferred it to the plaintiff on his paying the purchase-money. Possession of personal property implies title, and in every case of the sale of personal property in possession, there is an implied warranty of title in the vendor. (2 Kent, Com. 478; 2 Black. Com. 451; 1 J. R. 274; 3 Cow. 272; 3 Bac. 323.)

The important question in this case is, whether the plaintiff could recover without proving actual loss, or damage, by reason of defendant's want of title to the chattel. There was no evidence that plaintiff or his vendees had ever been disturbed in their possession or enjoyment of the property; nor had plaintiff ever parted with any money or property in consequence thereof.

It is true a judgment had been recovered against the plaintiff for the value of the horse; but, until satisfied, it only established a liability, not a loss. It might never be enforced. As the true owner was deprived of his property by a felony, he might pursue others, through whose hands it had passed, even the defendant, and satisfy his claim against them. Until a sat-

isfaction, the owner's rights of action against others than plaintiff, remained intact.

In its operation and legal bearings, this case is very like a covenant of warranty for quiet enjoyment in the sale of land. If A convey land to B, and B to C, and C to D, all with covenants of warranty for quiet enjoyment, and D is evicted, he may sue any or all of the preceding covenantors till he obtain satisfaction; but no intermediate covenantee can sue his covenantor till he himself has been compelled to pay damages upon his own warranty. (*Withy* v. *Mumford*, 5 Cow. 137; *Baxter* v. *Ryerss*, 13 Barb. 281.)

In the case of breach of an implied warranty of title to a chattel, the vendee is not bound to await legal action against him. If satisfied of the insufficiency of his vendor's title, and that the true owner would recover the property in an action, he may surrender it, and recover its value in an action against his vendor, by affirmatively establishing that the vendor was without title; or the vendee may await the prosecution of an action. If the vendor be notified of the action and required to defend, a judgment, if obtained, would be conclusive as to his want of title; but if not notified, and judgment is obtained, the onus of showing want of title would rest upon the vendee, the same as if surrendered without action. (*Sweetman* v. *Prince*, 26 N. Y. 224, 232.)

If the property be surrendered to the true owner, then the vendee's loss and damage is established; but if a judgment be had against him, either with or without notice, the vendee's loss or damage is not established without proofs of satisfaction or payment of the judgment. In this case, the true owner (as in cases of covenants of warranty running with the land) would have a right of action against any possessor subsequent to the larceny; and that possessor against any prior covenantors, which might be pursued until this damage or loss is satisfied; hence any intermediate vendee, or covenantee, could not be permitted to maintain an action against his immediate warrantor, or covenantor, in the absence of fraud, without proof of damage by loss of property or compulsory payment of money.

I think the plaintiff on the trial, by omitting to prove payment of the judgment obtained against him, failed to establish a right of action as against the defendant, and hence was properly nonsuited.

The judgment of the General Term should be reversed, and that of the Circuit affirmed.

All the judges voting, concurred. MASON and MURRAY, JJ., did not vote.

Order of General Term reversed, and judgment absolute for defendant.[1]

HARGOUS v. STONE.

(5 New York, 73.—1851.)

ACTION for breach of an implied warranty on a sale by defendant to plaintiff of 40,000 yards of brown cotton sheeting.

In July, 1839, plaintiff received from Mexico an order for 40,000 yards of brown cotton sheeting. He directed Stewart, as broker, to find goods of that description which would count 31 threads in the fourth part of a Spanish square inch. The broker was informed that the goods were to be sent to Mexico, and that they must count more than 30 threads in the quarter of a Spanish square inch. By the tariff then in force in Mexico, the importation of cotton goods in which the number of threads did not exceed thirty in a square which was the fourth part of a Spanish inch for each side, was prohibited, and the goods were liable to confiscation.

Stone furnished the broker with samples which were delivered to plaintiff, who selected one that was found to contain 31 threads. The examination was made with a Mexican glass. Plaintiff directed the broker to procure 40,000 yards like the sample selected. The broker told Stone that the plaintiff had selected one sample which was fine enough, and that he wanted 40,000 yards of it as quickly as possible. The broker did not tell Stone that the goods were destined for the Mexican market, nor what the Mexican tariff was in regard to such goods, nor did he tell him in express terms how fine the goods must be. The goods were ordered to be sent to Thorne's packing warehouse, for the purpose of being repacked in large packages. The goods were there delivered, and remained at Thorne's for

[1] See article on Implied Warranties in Sales by Emil McClain in Harvard Law Review, VII., 213.

several days; when repacked, the original bales were opened and the goods separated. There was nothing to prevent the plaintiff from examining the goods at Thorne's. He, however, did not examine them. When the goods arrived at Vera Cruz they were seized and confiscated, because, upon examination there, they were found to want the number of threads required by the Mexican law, and Stone was notified of the seizure.

About the time the goods were delivered at Thorne's, defendant sent plaintiff three bills of parcels of the goods, which made no reference to the degree of fineness of the goods, or any statement that the sale was by sample, and plaintiff made and delivered to defendant notes at eight months for aforesaid goods.

At the trial, the plaintiff was nonsuited.

PAIGE, J. The counsel for the appellant insists that the sale of the goods in question was by sample; and that such sale implied on the part of the vendor a warranty that the bulk of the goods corresponded in fineness with the sample; and that the appellant is entitled to recover the entire value of the goods, together with all moneys paid for freight, insurance, commissions, cartage, etc., as damages for the breach of the contract of warranty. *Cuveat emptor*, is an ancient rule of the common law, and stands in contradistinction to the rule of *caveat venditor* of the civil law. An implied warranty of title on a sale of chattels is common to both the common and civil law. But in regard to the responsibility of the seller to answer for the quality or goodness of the articles sold, there exists between these two systems of jurisprudence an irreconcilable disagreement. According to the civil law, a sound price implies a warranty of the soundness of the article sold. By the common law, the vendor is not bound to answer to the vendee for the quality or goodness of the articles sold, unless he expressly warrants them to be sound and good, or unless he knew them to be otherwise, and hath used some art to disguise them, or unless they turn out to be different from what he represented them to the buyer; in other words, there must be either an express warranty, or fraud, to make the vendor answerable for the quality or goodness of the articles sold. (2 Black. Com. 451; 2 Kent Com. 478; *Seixas* v. *Wood*, 2 Caines, 48; *Swett* v. *Colgate*, 20 John. 196.) This principle was emphatically asserted in the cases of *Chandelor* v. *Lopus*, Croke James, 4,

and of *Parkinson* v. *Lee*, 2 East, 315. And Justice Kent, in *Seixas* v. *Wood*, says, that these decisions are two centuries apart, and the intermediate cases are to the same effect. In *Chandelor* v. *Lopus*, it was determined in the court of exchequer, that for selling a jewel which was affirmed to be a bezoar stone when it was not, no action lay unless the defendant knew it was not a bezoar stone, or had warranted it to be one. In *Parkinson* v. *Lee*, decided in 1802, all the judges agreed that the rule of *caveat emptor* applied to the sale of all kinds of commodities; that without an express warranty by the seller, or fraud on his part, the buyer must stand to all losses arising from latent defects, and that there was no instance in the English law of a contrary rule being laid down. In that case, Grose, J., says, that before the case of *Stuart* v. *Wilkins*, 1 Doug. 20; K. B. year 1778, "It was a current opinion that a sound price given for a horse was tantamount to a warranty of soundness; but when that came to be sifted, it was found to be so loose and unsatisfactory a ground of decision, that Lord Mansfield resisted it, and said there must be an express warranty or fraud in the seller in order to maintain the action." In *Parkinson* v. *Lee*, there was an express warranty that the bulk of the hops purchased by the plaintiff corresponded with the sample by which they were sold. It turned out that although the bulk of the commodity agreed with the sample, yet that there was a latent defect existing in the hops, unknown to the seller, and without fraud on his part, but arising from the fraud of the grower from whom he purchased. And it was held unanimously by all the judges, that the law did not raise an implied warranty that the hops were merchantable. On the argument of that case, the counsel for the plaintiff pressed upon the court the doctrine that in every contract of sale of chattels, where a fair price was paid, there was an implied warranty that the commodity sold should be in a merchantable condition at the time of the sale. This doctrine the judges unanimously rejected, and they distinctly and emphatically reasserted the common law rule of *caveat emptor* in all its integrity. The decision in this case, as I understand it, rejected the whole doctrine of implied warranty in regard to the quality or goodness of the articles sold, as inapplicable to any case of an executed contract of sale. The decision of *Parkinson* v. *Lee*, was in 1802. Since the decision of that case, the common law judges at Westminster-hall have

manifested a strong disposition to borrow from the civil law its doctrine in relation to sales of chattels. Departing from the stern policy of their predecessors in resisting the encroachments of the civil law, and impelled by a new zeal for that system of jurisprudence, they have, step by step, introduced into the English system of the common law various modifications of the civil law doctrine of implied warranties on sales of chattels. Thus we find that in *Hibbert* v. *Shee*, 1 Camp. N. P. R. 113, year 1807, and in *Gardner* v. *Gray*, 4 Camp. R. 144, year 1815, Lord Ellenborough recognized the principle that a sale by sample implied a warranty that the bulk of the goods corresponded in quality with the sample. (See *Lorymer* v. *Smith*, 1 Barn. & Cres. 1, year 1822; *Parker* v. *Palmer*, 4 Barn. & Ald. 337, year 1821.) And in *Jones* v. *Bowden*, 4 Taun. 847, 852, year 1813, the English common pleas decided that a warranty of soundness was implied from the usage of trade. And in *Laing* v. *Fidgeon*, 6 Taun. 108, year 1815, the same court held, that in all contracts for the sale of manufactured goods by the manufacturer, a warranty was implied that the goods were merchantable. (*S. C.* 4 Camp. 169.) And in a great number of subsequent cases, the English common law courts advanced still farther in their departure from the common law, and held that in every sale, without any express warranty, there was an implied warranty that the goods were merchantable, and if sold for a particular purpose, that they were reasonably fit and proper for such purpose. (*Gardner* v. *Gray*, 4 Camp. 144, year 1815; *Bluett* v. *Osborn*, 1 Starkie, N. P. C. 384, year 1816; *Jones* v. *Bligh*, 5 Bing. 533, year 1829; *O'Kell* v. *Smith*, 1 Starkie, 107, year 1815; *Shepherd* v. *Pybus*, 3 Man. and Gran. 867, year 1842; *Brown* v. *Edgerton*, 2 Man. and Gran. 279, year 1841; *Olivant* v. *Bayley*, 5 Ad. and El. 288, year 1843.) In this State we have in several cases applied the civil law rule of *caveat venditor* to sales by sample. This is the only inroad we have made upon the common law rule of *caveat emptor*. And this exception to the general rule, Justice Bronson says "stands upon no principle." (1 Denio, 386.) But our courts have as yet only applied the doctrine of implying a warranty on a sale by sample, that the bulk of the goods equals in quality and goodness the sample exhibited, to sales of cotton packed in bales. The supreme court refused to extend the doctrine to a sale of Italian hemp packed in bales. (*Salisbury* v. *Stainer*, 19 Wend. 159.)

And the application of the doctrine is limited to sales where the purchaser has no opportunity of inspecting the article purchased. (12 Wend. 576, *Boorman* v. *Jenkins*; 19 Wend. 159, *Salisbury* v. *Stainer*.

Several of the cases of sales of packed cotton by sample, where the doctrine of implying a warranty has been applied by our courts, were clear cases of an express warranty. This was the character of the case of *The Oneida Manuf. Co.* v. *Lawrence*, 4 Cow. 440, which was the case in the supreme court in which the doctrine of implying a warranty on a sale by sample was expressly adopted. In that case the seller presented the agent of the purchaser with samples, declaring that they were drawn from the bales in his warehouse, and that it was good upland cotton, and that those were true samples. The only case, I believe, in the court of last resort, in which this doctrine has been recognized, was the case of *Waring* v. *Mason*, 18 Wen. 432. And that also was a plain case of an express warranty. The plaintiff there agreed to purchase, if the cotton was equal to the samples exhibited; and the agent of the defendants sold to the plaintiffs on this condition. This was an agreement, or in other words an express warranty, that the bulk corresponded in quality with the sample. Any representation or express affirmation that the bulk of the commodity sold is equal in quality to the sample exhibited, or that the sample is a true specimen of the bulk, presents the question of an express warranty. (19 John. 290; 4 Cow. 442.) Every exhibition of a sample to the purchaser at the time of the sale, does not, *per se*, make a sale by sample. There must be, Chancellor Walworth says, an agreement to sell by sample, or at least an understanding of the parties, that the sale is to be a sale by sample. (18 Wen. 434, 436.) The mere exhibition of a sample at the sale, amounts only to a representation that the sample exhibited has been taken from the bulk of the commodity offered for sale in the usual way. (18 Wen. 434.)

The sale of provisions for domestic use is not an exception to the general rule of *caveat emptor*. The remedy of the purchaser, where the provisions turn out to be unwholesome, is given on the ground of the knowledge of the unsoundness by the seller, which the law presumes, and not on an implied warranty that the provisions are wholesome. (*Moses* v. *Mead*, 1 Denio, 378· *Van Bracklin* v. *Fonda*, 12 John. 468; *Emerson* v. *Brigham*,

10 Mass. 197, 202; 3 Black. Com. 165.) Where provisions are sold as merchandise, and not for immediate consumption by the purchaser, there is no implied warranty of soundness. (1 Denio, 378; 10 Mass. 197.)

Executory contracts of sale do not depend on the same principles as executed contracts of sale. The doctrine of implied warranty has properly no application to the former. Where a contract is executory, that is, to deliver an article not defined at the time, on a future day, whether the vendor has at the time an article of the kind on hand, or it is afterwards to be procured or manufactured, the contract carries with it an obligation that the article shall be merchantable, at least of medium quality or goodness. If it comes short of this, the vendee may rescind the contract and return the article after he has had a reasonable time to inspect it. He is not bound to receive or pay for it, because it is not the thing he agreed to purchase. (*Howard* v. *Hoey*, 23 Wen. 351–2; *Hart* v. *Wright*, 17 Wen. 277; 2 Kent Com. 480; *Chanter* v. *Hopkins*, 4 Mees. & Welb. Exchr. 399, year 1838, per Lord Abinger, C. B. 404.) But if the article is at the time of the sale in existence and defined, and is specifically sold, and the title passes *in presenti* to the vendee, the transaction amounts to an executed sale; and although there is no opportunity for inspection, there will be no implied warranty that the article is merchantable. (*Howard* v. *Hoey*, 23 Wen. 351; *Hart* v. *Wright*, 17 Wen. 269; *S. C.* 18 Wen. 449; *Waring* v. *Mason*, 18 Wen. 433, per Chan.)

Where the sale is executory if the goods purchased are found on examination to be unsound, or not to answer the order given for them, the purchaser must immediately return them to the vendor or give him notice to take them back, and thereby rescind the contract; or he will be presumed to have acquiesced in the quality of the goods, (2 Kent Com. 480; *Fisher* v. *Samuda*, 1 Camp. N. P. R. 190; *Hopkins* v. *Appleby*, 1 Stark, N. P. R. 477; *Milner* v. *Tucker*, 1 Car. & P. N. P. R. 15; 23 Wen. 352.)

The cases in our courts in which the doctrine of implied warranty on a sale by sample has been advanced are, *The Oneida Man. Co.* v. *Lawrence*, 4 Cow. 440; *Andrews* v. *Kneeland*, 6 Cow. 354; *Gallagher* v. *Waring*, 9 Wen. 20; *S. C.* 18 Wen. 425; *Beebe* v. *Robert*, 12 Wen. 413; and *Boorman* v. *Jenkins*, 12 Wen. 566. These were all cases of sales of cotton packed

in bales. The decision in each of them was put upon the assumed ground that the purchaser had no opportunity to examine the bulk of the commodity sold. The first case, that of *The Oneida Manu. Co.* v. *Lawrence*, was, as we have seen, a case of an express warranty. It was therefore unnecessary to place the decision of that case on the ground of an implied warranty. Ch. J. Savage, in that case, advanced the doctrine of implying a warranty on a sale of packed cotton, on the authority of the case of *Rose* v. *Beattie*, decided by the constitutional court of South Carolina. (2 Nott and McCord, R. 540–1.) That case was no authority in this State for the decision of Ch. J. Savage, for the reason that in South Carolina the civil law rule that a sound price implies a warranty of soundness, prevailed. Ch. J. Savage assumed that there was no opportunity of inspecting cotton packed in bales, and held, adopting the precise language of Justice Nott in *Rose* v. *Beattie*, "that every sale of packed cotton must be considered in the nature of a sale by sample, which (he says) amounts to a warranty that the whole bulk shall compare with the specimen exhibited. The subsequent cases in the supreme court of this State were decided upon the authority of the case of *The Oneida Man. Co.* v. *Lawrence*. The supreme court in all these cases assumed that there was no opportunity to inspect the cotton, not because the inspection was impracticable, but because it was inconvenient and expensive. (12 Wen. 419, 575.) The evidence in the case of *Boorman* v. *Jenkins*, 12 Wen. 569, shows how unfounded was this assumption. In that case an experienced cotton broker testified, that by cutting a rope cotton could be drawn from the centre of the bale, and that this was done when it was suspected that the cotton had been fraudulently packed. In *Hyatt* v. *Boyle*, 5 Gill and Johnson, 110, year 1833, the court of appeals of the State of Maryland held that the exception to the rule of *caveat emptor* applies only to cases where an examination is at the time of the sale morally speaking impracticable. Dorsey, J., in that case says, "The mere fact of the inspection being attended with inconvenience is not equivalent to its impracticability. If the purchaser desire to avoid it, and yet obtain the protection it would afford, he must do so by exacting from the vendor an express warranty of quality." Justice Cowen, in *Hart* v. *Wright*, 17 Wen. 274, expressed an unqualified approbation of the remarks of

Judge Dorsey. There is certainly no impracticability in inspecting cotton packed in bales, although there may be both inconvenience and expense. It is to be regretted that any disposition should at any time have been manifested by our courts to relax the rule of *caveat emptor*, and to imply a warranty where none was either actually made or intended by the parties. It would have been by far the wisest and best policy to have adhered strictly to the rule, that the seller, in the absence of fraud and an express warranty, was not answerable for latent defects. The ablest jurists of England and this country have earnestly and eloquently defended the wisdom of the common law maxim of *caveat emptor*. (17 Wen. 275, Cowen, J.; 18 Wen. 454–5, Ch. Walworth; 1 Denio, 386, Bronson, J.; 2 Kent Com. 480, note; 3 Rawle, 44, Ch. J. Gibson.) Ch. J. Gibson says, in *Borrekins* v. *Bevan*, 3 Rawle, 44, that "I prefer the rule of the common law because it seems to be more convenient and just than the rule of the civil law; more convenient because it furnishes a plain test of the vendor's liability in two words, 'warranty or fraud,' and more just because it pretends not to release the vendee from his bargain, where it happens to be a bad one." And in *McFarland* v. *Newman*, 9 Watts, 86, he says, "No more should be required of parties to a sale than to use no falsehood, and to require more of them would put a stop to commerce itself, by driving every one out of it by the terrors of endless litigation." Justice Richardson, in *The Comrs. of Highways* v. *Newberry Dis.* 2 McCord, 407, Constitu. Ct. of S. C., says, speaking of the rule of *caveat venditor*, as extended in South Carolina to every species of property, thus, "We find practically established in judicial proceedings, a species of eminent domain to make or break contracts."

The rule of *caveat emptor* is eminently adapted to a commercial community. It encourages trade by preventing actions against all in turn through whose hands the article of commerce has passed in a course of dealing. Large quantities of products, and articles of manufacture, are daily passing through the hands of *bona fide* purchasers and of agents, commission merchants, consignees and factors; and to apply to these persons the principle of *caveat venditor* would lead to endless litigation, and seriously embarrass the operations of trade. This rule creates obligations where none were intended. It implies war-

ranties where none were actually made. The most just and convenient rule is, to confine the responsibility of the seller in relation to the quality and goodness of the articles sold, to the case of an express warranty or fraud. This rule will effectuate the intention of the parties, and will not surprise the seller with responsibilities he never intended to assume. Where the article sold is equally accessible to both parties, and its quality equally unknown to both, there can be neither justice nor propriety in implying a warranty on the part of the seller against latent defects. It is more just to require the purchaser to apply his attention to those particulars which are within the reach of his observation and judgment, and the vendor to communicate all defects within his knowledge and not apparent on inspection. (1 Fonb. Eq., 380, *n.*) And if the purchaser does not wish to run the risk of latent defects, to require him to provide himself an indemnity against such defects, by exacting an express warranty from the vendor. When such warranty is required, the vendor will be at liberty to decide for himself whether he will enter into a contract of warranty or not.

As for myself, I feel indisposed to multiply the exceptions, if any now exist, to the rule of *caveat emptor*, and disinclined to relax the rule any further than I am compelled to do by the strict letter of the decisions of our courts. In my opinion, the sale of the brown cotton sheetings in the present case was not, under the principles above advanced, a sale by sample. And I do not think that the doctrine of implying a warranty on a sale by sample should be applied to a sale of sheetings, although packed in bales. But if the doctrine is applicable, there is no evidence in this case from which an agreement or understanding of the parties that this was to be a sale by sample can be inferred. The purchase was made from Stone by a broker acting as agent for the plaintiff. The proof fails to show that Stone had any knowledge of the Mexican tariff, or of the difference between the Spanish and American inch, or that the goods were destined for the Mexican market. And there is no evidence that Stone was told by either the plaintiff or the broker that the goods to be purchased must count thirty-one threads in the fourth part of a Spanish square inch. And it is in proof that it is not unusual for domestic goods to vary one or two threads, in the quarter of an inch. The goods in question averaged from twenty-eight to twenty-nine threads to the fourth of a Spanish

square inch. It is proved that the threads could not be counted without a glass, and that Stone had no glass at the time of the sale. The sample which the broker swears the plaintiff selected was left with the plaintiff, and it does not appear that it was returned to Stone to enable him to compare it with the goods delivered, in order to ascertain whether their fineness corresponded with each other. There was no affirmation by Stone that the sample selected was a true sample of the goods delivered, or that the goods would count thirty-one threads to every one-fourth part of a Spanish inch, and no promise on his part to deliver goods of that degree of fineness. The plaintiff did not make it a condition of his accepting the goods that they should correspond in fineness with the sample exhibited. One of the samples which the broker exhibited to the plaintiff, the broker cut himself from an open sample bale in Stone's store. This bale was one of the twenty which Stone had on hand at the time of the negotiation, and which he delivered for the plaintiff at Thorne's packing warehouse. If the sample selected was the one cut from the open sample bale, it is altogether probable that the goods delivered did correspond with the sample. The variation of the number of threads, as counted by the plaintiff, and in Mexico, may be accounted for by the different character of the glasses used in New York and in Mexico. The variation was no greater than usually occurs in every bale of this kind of goods. The case fails to show that the sample exhibited and selected was the one furnished by Stone; and it also signally fails to show that it was exhibited by Stone as a specimen of the bulk of the goods he had on hand, and of the goods he was able to procure, and would deliver, to fill the plaintiff's order. The broker acted only as the agent of the plaintiff. He was not the common agent of both parties. To make a sale by sample there must be an agreement to sell by sample, or at least an understanding of the parties that the sale is to be by sample, from which an agreement can be inferred. (*Waring* v. *Mason*, 18 Wen. 433–4–6.) There is not sufficient evidence in this case to authorize an inference that the parties here agreed that the sale should be by sample. But if the sale was a sale by sample, no warranty can be implied that the bulk of the goods should equal in fineness the sample, because the plaintiff had an opportunity to inspect the goods. The plaintiff could have examined the twenty bales first delivered, when in Stone's possession, or

while they were at Thorne's warehouse. At Thorne's warehouse there was neither any difficulty, inconvenience, or expense, in inspecting the goods. Every bale was there opened, and the goods separated and repacked. While this process was going on, the goods could and ought to have been examined. If it is a good ground of objection that this was after the delivery, and therefore after the title passed, I answer that the inspection was practicable, and the plaintiff should therefore have examined the goods to ascertain for himself whether they were of sufficient fineness before, or at the time of, the delivery at Thorne's, and before he accepted them. In sales of packed cotton it is held there is no opportunity of inspecting the commodity, because this cannot be done without breaking up and repacking the bales. (12 Wen. 419, 574, 5; 4 Cow. 444.) In this case the plaintiff, at the time of the sale, intended to break up the bales and repack the goods, and he had them delivered at Thorne's warehouse for that purpose.

As to the twenty-three bales received from Boston, if the order required goods of any particular fineness to be furnished, the contract of sale was executory. It was a contract to deliver articles not specifically defined at the time, indeterminate things, any twenty-three bales of brown cotton sheetings. The contract of sale was, therefore, necessarily as to the number of bales which Stone had not on hand, executory; and being so, the plaintiff, after having had a reasonable time after the delivery of the twenty-three bales to inspect the goods, if they did not answer his order, he should have returned them to Stone, or given him notice to take them back. Having failed to do so, he will be presumed to have acquiesced in the quality of the goods. Every one of the twenty-three bales was opened, and the goods separated and repacked at Thorne's. They were at Thorne's several days; and, while there, the plaintiff had sufficient time and ample opportunity to examine them and to ascertain before they were shipped whether they corresponded with the order or not.

In *Vanderhorst* v. *McFaggert*, 2 Bay R. 498, Consti. Court, S. Carolina, in 1803, it was held, that on sales of rice or of any other staple article of South Carolina, it was the duty of the purchaser to examine the article before it was shipped, and that by a neglect so to do he tacitly admits the quality to be good, and takes the risk on himself. As to the twenty-three

bales, the sale cannot under any view which may be taken of the evidence be regarded as a sale by sample. A sale by sample is where certain determinate commodities in existence, and in the seller's possession, or under his control at the time of the sale, are specifically sold by samples taken from the bulk of such commodities. The twenty-three bales were not in Stone's possession or under his control at the time of the sale; nor were they specifically sold, nor did any property in these identical bales pass at the time of the sale to the plaintiff. I am also inclined to believe that the samples selected by the plaintiff ought to be regarded as a fair specimen of the bulk of the goods delivered. It will be remembered that Stone, the seller, had no knowledge that the goods were to be sent to the Mexican market, nor any knowledge of the Mexican revenue laws. It is in evidence that goods like those purchased usually vary one or two threads in the space of a quarter of an inch. With this fact, the plaintiff, being a dealer in these goods, must be presumed to have been acquainted. The goods delivered actually averaged twenty-eight to twenty-nine threads to the fourth part of a Spanish square inch. There is no evidence to show that in the New York market there is any difference in the price or value of cotton sheetings which count twenty-eight, or twenty-nine, or thirty-one threads within the space of a fourth part of a Spanish square inch. In *Sands* v. *Taylor*, 5 John. 395, the plaintiff sold to the defendant, a malster and brewer, a cargo of Virginia wheat which was known to be Southern wheat, and which is always more or less heated, but not so as to injure it when manufactured into flour, although it renders it unfit for malting. A sample, taken in the usual manner from the cargo, was exhibited to the defendant before the purchase, which, on experiment, was found to malt. It was held that the sample was a fair specimen of the quality of the cargo. Spencer, J., says, that the exhibition of the sample did not warrant against the fact that the cargo was heated, which prevented its malting. He said that this was a fact with which the defendant must be presumed to be acquainted, "for the law will presume every dealer in articles brought to market, acquainted with all the circumstances usually attendant on cargoes composed of those articles." If the sample in this case is to be regarded as a fair specimen of the goods purchased, then there is no breach of any assumed warranty that

the bulk of the twenty bales should equal the sample in fineness, nor any violation of the obligation implied in the executory contract to sell twenty-three bales; that goods of a particular fineness should be delivered, and the delivery of the twenty-three bales was a substantial compliance with the order given for them. Stone was guilty of no fraud or false representation, and he made no express warranty of any kind. My opinion is, and such is the opinion of the court, that the plaintiff made out no cause of action, and that he was properly nonsuited. The judgment of the supreme court must therefore be affirmed.

Judgment affirmed.

HANSON ET AL. v. BUSSE.

(45 Illinois, 496.—1867.)

LAWRENCE, J. This was action, brought by Hanson and Barrett, against Busse, to recover the price of one hundred and ten barrels of apples, sold by them to Busse. The demand was resisted, on the ground that the apples, when opened, proved to be decayed and entirely worthless. The jury found for the defendant and the plaintiffs appealed.

The court gave for the defendant a series of instructions, nearly all of which embody the idea, that if the plaintiffs represented the apples to be good, and the defendant bought them, relying upon such representations, and they were bad and unmerchantable, and the defendant offered, at once, to return them, he would not be liable for the price.

In reference to the sale of personal property, which is open to the inspection and examination of the purchaser, this would not be the law. In such cases it is immaterial how far the purchaser may rely upon the representations of the vendor as to the quality of the goods, if there was no intention on the part of the vendor to warrant, and if he used no language fairly implying such an intent. The different rule of the civil law may be founded on higher morals, and the modern decisions, both in England and this country, seem to be tending in that direction. This tendency is shown in the recognition of exceptions to the rule. But the rule itself must be considered firmly

settled in the common law, that the vendor of goods which the purchaser has, at the time of purchase, the opportunity of examining, is not responsible for defects of quality, in the absence of fraud and warranty; and although no particular form of words is requisite to constitute a warranty, yet a simple commendation of the goods, or a representation that they are of a certain quality does not make a warranty, unless the language of the vendor, taken in connection with the circumstances of the sale, fairly implies an intention, on his part, to be understood as warranting. The rule has been thus laid down by this court in several cases. *Towell* v. *Gatewood*, 2 Scam. 22; *Adams* v. *Johnson*, 15 Ill. 345, and *Kohl* v. *Linder*, 39 id. 195. In the last case the rule is fully considered.

But, although these instructions would be erroneous if applied to ordinary sales of personal property open to inspection, yet they must be considered in reference to their application to this particular case, and, tried by that standard, we cannot say they misled the jury. As stated by this court in *Kohl* v. *Linder*, above quoted, one of the exceptions to the general rule is, where the sale is made by sample, and another, where the purchaser has no opportunity for inspection. The bulk must be as good as the sample, and, if there is no opportunity for examination, the article sold must be what the vendor represents it to be. In such cases the maxim *caveat emptor* can have no application.

In the case before us the proof shows that the 110 barrels were piled up in tiers at a railway depot in Chicago. The purchaser went with the clerk of the plaintiffs to look at them. They opened a couple of barrels that stood on the floor. The purchaser was lame from rheumatism, and requested the clerk to climb up and open a barrel on the top of the tiers. He did so, and showed the purchaser some apples which were in good condition, and said they were all like that. The plaintiffs had told the defendant the apples were just such as he had previously bought, shipped by the same man, and good handpicked fruit. The apples in the three barrels exhibited as samples were unquestionably merchantable, or the defendant would not have bought. It would be unreasonable to require that he should have opened every one of the 110 barrels. He had the right to rely on the samples shown to him, and on the representations of the plaintiffs that the apples were good. He had no opportunity for the exercise of his own judgment, and the plain-

tiffs must have known that he bought relying upon their representations. The case falls clearly within the exceptions to the general rule above mentioned, and there is no ground for saying *caveat emptor*. The verdict was just, and the instructions as applied to the facts of this case could not have misled the jury.

The plaintiffs' instructions were properly refused, because inapplicable to the facts of this case. They would have tended to mislead the jury.

The judgment must be affirmed.

Judgment affirmed.

GOULD ET AL. v. STEIN ET AL.

(149 Massachusetts, 570.—1889.)

PLAINTIFFS were dealers in rubber in Boston, and defendants were importers of rubber in New York. One Greene, a broker, employed by defendants, exhibited to plaintiffs a sample of second quality Ceara scrap rubber, like stock then in defendants' store. Gould went to defendants' store, made some examination of the rubber, and had opportunity to examine as many bales as he desired. The broker then wrote the following bought and sold notes, and gave them to both parties: "Sold to Messrs. Henry A. Gould & Co. on account of Messrs. Abe Stein & Co. one hundred and forty-eight (148) bales Ceara scrap rubber, as per samples, viz. forty-six (46) bales of first quality, marked A, at forty-seven (47) cents per pound, and one hundred and two (102) bales of second quality at forty-two and one-half ($42\frac{1}{2}$) cents per pound. . . . All payable by four (4) months' note to buyers' order, with interest at rate of six (6) per cent per annum from delivery. The rubber was delivered, and some time thereafter it was discovered that only 8 bales were of good second quality, the remaining being of very inferior quality.

Judgment for plaintiffs; defendants except.

C. ALLEN, J. The determination of this case depends upon the construction to be given to the bought and sold notes, which were similar in their terms. It does not admit of doubt that

these notes were intended to express the terms of the sale. They were carefully prepared, and were read to the parties line by line as they were written. Of course all the existing circumstances may be looked at, but the contract of the parties is to be found in what was thus written, when read in the light of those circumstances. The goods respecting which the controversy has arisen were a certain lot of rubber which the defendants had on hand, and which could be identified. The transaction was a present sale, and not an agreement to deliver rubber in the future. The defendants now contend that the contract was executory, and that if there was any warranty there was none which survived the acceptance of the goods by the plaintiffs; but the argument that it was not an executed present sale finds no support in the bill of exceptions, and no such point was taken at the trial, and there is no occasion to consider the further question whether, in case of an executory agreement to sell, a warranty will survive the acceptance of the goods.

The bought note which the plaintiffs put in evidence was of "148 bales Ceara scrap rubber, as per samples, viz. 46 bales of first quality, marked A, . . . and 102 bales of second quality." The controversy relates only to the one hundred and two bales. It appeared that there was no exact standard by which the grade of rubber could be fixed, but that it was a matter of judgment. The court also found that Ceara rubber of second quality is well known in the market, as distinct from a third or inferior grade; and there was evidence which well warranted this finding. The parties in their contract recognized the existence of different grades or qualities, though all of the rubber properly classified as of first quality or of second quality might not be of an exactly uniform standard or grade.

The plaintiffs at the trial claimed damages merely on the ground that the one hundred and two bales were not of second quality, and made no claim of inferiority to the samples shown, as a distinct ground, but waived all claim founded on the exhibition of samples; and the court found damages for the plaintiffs solely on the ground that the defendants failed to deliver rubber of the second quality, ruling that the broker's note contained an absolute warranty of second quality rubber. If this ruling was right, it disposes of the defendants' second and third requests for instructions.

The general rule is familiar and admitted, that a sale of goods by a particular description imports a warranty that the goods are of that description. (*Henshaw* v. *Robins*, 9 Met. 83; *Harrington* v. *Smith*, 138 Mass. 92; *White* v. *Miller*, 71 N. Y. 118; *Osgood* v. *Lewis*, 2 Har. & Gill, 495; *Randall* v. *Newson*, L. R. 2 Q. B. Div. 102; *Jones* v. *Just*, L. R. 3 Q. B. 197; *Josling* v. *Kingsford*, 13 C. B. [N. S.] 447; *Bowes* v. *Shand*, 2 App. Cas. 455.) And where goods are described on a sale as of a certain quality, which is well known in the market as indicating goods of a distinct though not absolutely uniform grade or standard, the description imports a warranty that the goods are of that grade or standard. In such cases, the words denoting the grade or quality of the goods are not to be treated as merely words of general commendation, but they are held to be words having a specific commercial signification. Thus, in *Hastings* v. *Lovering*, 2 Pick. 214, the words in a sale-note, "Sold Mr. E. T. Hastings two thousand gallons prime quality winter oil," were held to amount to a warranty that the article sold agreed with the description; and in *Henshaw* v. *Robins*, 9 Met. 83, 87, it was said that the doctrine laid down in that case has ever since been considered as the settled law in this Commonwealth. So in *Chisholm* v. *Proudfoot*, 15 U. C. Q. B. 203, it was held that, where a manufacturer of flour marked it as of a particular quality, viz. "Trafalgar Mills Extra Superfine," it amounted to a warranty of its being of such a quality. A similar doctrine may be found in *Hogins* v. *Plympton*, 11 Pick. 97; *Winsor* v. *Lombard*, 18 Pick. 57, 60; *Forcheimer* v. *Stewart*, 65 Iowa, 593; and *Mader* v. *Jones*, 1 Nova Scotia, 82. In *Gardner* v. *Lane*, 9 Allen, 492, and 12 Allen, 39, it appeared that the statutes provided for the preparation, division into different qualities, packing, inspecting, and branding of mackerel, and it was held that, if a certain number of barrels of No. 1 mackerel were sold, and by mistake barrels of No. 3 mackerel were delivered, no title passed to the purchaser, and that the barrels of No. 3 mackerel thus delivered by mistake might be attached as property of the vendor, and that each different quality, after thus being prepared for market, was to be regarded as a different kind of merchandise, so that no title passed to the vendee; there being no assent on the part of the vendee to take the No. 3 mackerel in place of those which he agreed to buy.

Now, if the words "as per samples" had not been in the

bought note, it would be quite plain that the present case would fall within the ordinary rules above given. But the insertion of those words raises the inquiry whether they limit the implied warranty of the vendor, so that, if the rubber sold was equal in quality to the sample, he would be exonerated from liability, though it was not entitled to be classed as of the second quality. If no other meaning could be given to the words "as per samples," except that they alone were to be considered as showing the quality of rubber to be delivered, the argument in favor of the defendants' view would be irresistible. So, if there was a plain and necessary inconsistency between the two descriptions of the rubber, it might perhaps be successfully contended that the vendor's obligation was only to deliver rubber which would conform to the inferior quality described; that is to say, that, in case of such inconsistency, the words "as per samples" should prevail, and the words "of second quality" be rejected. If it were to be held that the vendor's obligation was fulfilled by delivering rubber of a quality equal to the samples, though it was not of the second quality, then the words "of second quality" would mean nothing, or they would be overborne by the words "as per samples." But it is found that the bought note admits of a reasonable construction, by which a proper significance can be given both to the words "as per samples" and also to the words "of second quality," there will be no occasion to disregard either.

Cases are to be found in the books, where such a construction has been given to contracts of sale. Thus, in *Whitney* v. *Boardman*, 118 Mass. 242, a sale of Cawnpore buffalo hides, with all faults, was held to mean with such faults or defects as the article sold might have, retaining still its character and identity as the article described; and the court cited with approval the case of *Shepherd* v. *Kain*, 5 B. & Ald. 240, where there was a sale of a copper-fastened vessel, to be taken "with all faults, without allowance for any defects whatsoever," and this was held to mean only all faults which a copper-fastened vessel might have; the court saying, by way of illustration, "Suppose a silver service sold 'with all faults,' and it turns out to be plated." So in *Nichol* v. *Godts*, 10 Exch. 191, an agreement for the sale and delivery of certain oil, described as "foreign refined rape oil, warranted only equal to samples," was held to be not complied with by the tender of oil which was not for-

eign refined rape oil, although it might be equal to the quality of the samples. The decision of this case has stood in England, though not without some questioning at the bar. See *Wieler* v. *Schilizzi*, 17 C. B. 619; *Josling* v. *Kingsford*, 13 C. B. (N. S.) 447; *Mody* v. *Gregson*, L. R. 4 Ex. 49; *Jones* v. *Just*, L. R. 3 Q. B. 197; *Randall* v. *Newson*, L. R. 2 Q. B. D. 102.

In the present case, by a fair and reasonable construction of the bought note, effect can be given to both of the phrases used to describe the rubber. Construed thus, the article sold was one hundred and two bales of Ceara rubber, of the second quality, and as good as the samples. The rubber delivered was, in fact, Ceara rubber; there was no question that it was of the right kind. But it was not of the second quality. There is no necessity to disregard the words describing the rubber as of the second quality. They signified a distinct and well known, though not absolutely uniform, grade of rubber. There was no exact standard or dividing line between rubber of the second quality and of the third quality, any more than there is between daylight and darkness. But nevertheless a decision may be reached, and it may be easy to reach it in a particular case, that certain rubber is or is not of the second quality. This general designation being given, the specification "as per samples" being also included in the note, the rubber must also be equal to the samples. It must be rubber of the second quality, and it must be equal to the samples. If it fails in either particular, it is of no consequence that it conforms to the other particular. There is no inconsistency in such a twofold warranty, and this rubber having been found to be not of the second quality, the warranty was broken, without regard to the question whether or not it was equal to the samples.

The fact that the plaintiffs had an opportunity to examine the rubber, and actually made such examination as they wished, will not necessarily do away with the effect of the warranty. The plaintiffs were not bound to exercise their skill, having a warranty. They might well rely on the description of the rubber, if they were content to accept rubber which should merely conform to that description. *Henshaw* v. *Robins*, 9 Met. 83; *Jones* v. *Just*, L. R. 3 Q. B. 197. And the exhibition of a sample is of no greater effect than the giving of an opportunity to inspect the goods in bulk. Notwithstanding the sample or the inspection, it is an implied term of the contract that the

goods shall reasonably answer the description given, in its commercial sense. *Drummond* v. *Van Ingen*, 12 App. Cas. 284; *Mody* v. *Gregson*, L. R. 4 Ex. 49; *Nichol* v. *Godts*, 10 Exch. 191. In the two former of these cases it was held that there might be, and that under the circumstances then existing there was, an implied warranty of merchantable quality, notwithstanding the sale was by a sample, which sample was itself not of merchantable quality, the defect not being discoverable upon a reasonable examination of the sample.

The point urged in the defendants' argument, that the plaintiffs' remedy was destroyed by their acceptance of the goods, was not taken at the trial, and no ruling was asked adapted to raise the question as to the effect of such acceptance.

For these reasons, in the opinion of a majority of the court, the entry must be

Exceptions overruled.

Dowdle v. Bayer et al.

(9 Appellate Division, 308.—1896.)

Adams, J. This action was brought upon a contract entered into between the parties, by which the plaintiff agreed to sell and deliver to the defendants a carload of cedar posts.

The plaintiff resides at the city of Oswego, and the defendants at the city of Troy, at the latter of which places the contract in question was entered into on the 6th day of June, 1893, and a written memorandum thereof was made, of which the following is a copy:

"Troy, 6, 6, 1893.

"Bought this day of W. J. Dowdle 1 car-load 600 pieces, 8 ft. cedar posts, 4 inches and over at top and being largely 4½ and over, with but a small percentage 4″. Price 16 c. f. o. b. cars here.

"Bayer & McConihe."

Upon the fifteenth day of June following the plaintiff shipped to the defendants a carload of posts by the Delaware, Lackawanna and Western Railroad Company. The car contained 795 posts

instead of the number specified in the memorandum, and reached the city of Troy on or about the twenty-third day of June, and upon its arrival the defendants' employees started to unload the same, and in doing so discovered that the posts were of an inferior quality. This fact was communicated to the defendants, one of whom immediately went to the car and examined such of the posts as had been removed from, as well as those which remained upon, the car, and becoming satisfied from such inspection that the posts were not of a merchantable quality, directed that such of them as had been taken from the car should be returned, and immediately notified the plaintiff that the defendants declined to accept the posts, for the reason that they were not of the quality ordered.

The issues joined in this action were referred to a referee, to hear and determine the same, and he has found, as a fact in the case, that the posts in question were purchased upon an implied warranty that they were to be merchantable in quality, and that the same were not merchantable, but that the taking of a wagon load of posts from the car was the exercise of such an act of ownership on the part of the defendants as amounted to a waiver upon their part of the plaintiff's breach of the contract. And, as a conclusion of law, he has found that the defendants are liable to the plaintiff upon the contract in the sum of sixty-four dollars and sixty-five cents.

We find ourselves unable to concur in this conclusion of the learned referee. The contract of sale in this case was executory in its character, and the referee was unquestionably justified in finding that it carried with it an implication that the posts in question should be of a merchantable quality, and that, as a matter of fact, they did not answer that description. This being the case, the defendants were not bound to accept the posts until they had been afforded a fair and reasonable opportunity to inspect the same and satisfy themselves that they corresponded in quality with those purchased. In other words, this was a case where the defendants were called upon to make an inspection within a reasonable length of time after the opportunity to do so was afforded, and then either to accept or reject the posts, and, in case of rejection, to at once notify the vendor thereof. (*Sprague* v. *Blake*, 20 Wend. 61; *Pierson* v. *Crooks*, 115 N. Y. 539.)

We think the defendants did nothing which can justly be

regarded as an acceptance of these posts. As soon as they learned from their employees that the posts were inferior in quality they made a personal inspection of the same and directed that the single wagon load which had been taken from the car, but had not been removed from the freight yard, should be replaced upon the car, and, upon the very same day notified the plaintiff of their refusal to accept the same. This, it seems to us, was all they were called upon to do, and, in view of the established fact that there was a breach of the contract upon the part of the plaintiff, we are unable to see upon what principle he is entitled to recover in the action. We think, therefore, that the judgment should be reversed and a new trial directed, with costs to abide the event.

All concurred.

Judgment reversed and a new trial ordered, with costs to abide the event.

HOE ET AL. v. SANBORN.

(21 New York, 552.—1860.)

ACTION upon a promissory note for $467.88 given in payment of the purchase price of a quantity of circular saws. Defense, breach of warranty of quality. Evidence was admitted tending to show that one of said saws was so soft as to be entirely useless, owing to defective material or want of being properly tempered. Evidence that the plaintiffs manufactured said saws for the express use of the defendant's mills was excluded.

The court directed a verdict for the plaintiffs, and judgment entered thereon was affirmed by the General Term of the Supreme Court.

SELDEN, J. If, to sustain the defence in this case, it was necessary to show that the plaintiffs had agreed to manufacture these saws for a specific purpose, and that when tried one or more of them proved not to be adapted to or useful for that purpose, then the rulings of the judge upon the trial may have been right. Such a contract would be entirely different from

an ordinary sale, with a general warranty of quality, and would require to be specially stated. But, on the other hand, if upon every sale of a manufactured article by the manufacturer himself, there is an implied warranty that the article sold is free from any latent defect growing out of the process of manufacture, then the cause should have been submitted to the jury upon the evidence given. It is not necessary, in pleading, where a party relies upon a mere general warranty of the quality of goods sold, to state whether the warranty is express or implied. A general averment that the vendor warranted the articles to be of a good quality, is sufficient. Proof of a warranty of either kind will support the averment. In the view I take of this case, therefore, it is only necessary to consider whether, upon a sale by a manufacturer, of articles manufactured by himself, he impliedly undertakes that such articles are of fair quality, and have no secret defect arising out of the manner in which they were manufactured.

It may not be possible to reconcile all the decisions upon the subject of implied warranties upon the sale of goods; but if we keep steadily in view the principle which lies at the basis of all such cases, we shall find that much of the apparent conflict will disappear. It is a universal doctrine, founded upon the plainest principles of natural justice, that, whenever the article sold has some latent defect which is known to the seller, but not to the purchaser, the former is liable for this defect, if he fails to disclose his knowledge on the subject at the time of the sale. In all such cases, where the knowledge of the vendor is proved by direct evidence, his responsibility rests upon the ground of fraud. But there are cases in which the probability of knowledge on the part of the vendor is so strong, that the courts will presume its existence without proof; and in these cases, the vendor is held responsible upon an implied warranty. The only difference between these two classes of cases is, that in one the *scienter* is actually proved, in the other it is presumed.

It is obvious that the vendor of goods would be very likely to know whether he has a title to the goods he sells. He knows the source from which such title was obtained, and has, therefore, means of judging of its validity which the purchaser cannot be supposed to have. Hence it is the doctrine, both of the civil and the common law, that every vendor impliedly warrants that he has title to what he assumes to sell.

Some slight doubt has been supposed to be thrown upon this doctrine, in England, by the remarks of Parke, B., in the case of *Morley* v. *Attenborough*, 3 Exch. 500. It is, however, too well settled, both in England and in this country, to be overthrown or shaken by the *obiter dicta* of a single judge. My object is, not to establish this doctrine, which admits of no doubt, but simply to show that it rests upon the foundation here suggested, viz., the presumed superior knowledge of the vendor in regard to his title. The case of *Morley* v. *Attenborough* itself tends, in my view, to confirm this position. It arose upon a sale, by a pawnbroker, of a harp pledged with him as security for a debt. The sale was made through auctioneers, and a general catalogue was furnished to the bidders, which "stated on the title page that the goods for sale consisted of a collection of forfeited property." The court held, that there was no implied warranty of title in that case. There was, perhaps, good reason why this case should be considered an exception to the general rule. The pawnbroker could not justly be presumed to have any special knowledge in regard to the ownership of the articles pledged. The probability was, that he had received them upon the faith of the pledgor's possession alone, and the purchaser was, in this respect, upon an equal footing with himself.

There are other exceptions to the general rule, which have the same tendency. The case of judicial sales is one. There is no ground for presuming that the officer of the law has any peculiar knowledge on the subject of the title to the property he exposes to sale. No doubt both the pawnbroker and the officer, if shown to have knowledge which they conceal, would be liable for fraud; or, if they could justly be presumed to have such knowledge, would be liable upon an implied warranty. It was expressly held, in the case of *Peto* v. *Blades*, 5 Taun. 657, that the law raises an implied promise on the part of a sheriff, who sells goods taken in execution, that he does not know that he is destitute of title to the goods.

A very ancient and leading case on the subject of implied warranty of title, viz., *Cross* v. *Gardner*, Carth. 90, shows the ground of liability to be that here suggested. There, the plaintiff sought to recover against the defendant for selling a pair of oxen as his, when they in truth belonged to another. It was objected that the declaration neither stated that the defendant

deceitfully sold the oxen, nor that he knew them to be the property of another person. But the court held the defendant liable, because the plaintiff had no means of knowing to whom the property belonged but only by the possession. This plainly implies that the defendant had better means of knowledge; and upon this presumption, the court evidently proceeded. That this was the foundation of the decision, appears also from another report of the same case (1 Shower, 68), where the ground taken was, that, "if a man, having possession of goods, sell them as his own, an action lies for the *deceit*." Now, deceit implies knowledge, and as no knowledge was proved, it must have been presumed.

In an older case still, viz., *Dale's Case*, Cro. Eliz. 44, the court decided, by two judges against one, that the action would not lie, because there was no allegation, or proof, that the defendant knew of the defect in his title. But, to use the language of Croke, "Anderson *contra*, for *it shall be intended* that he that sold had knowledge whether they were his goods or not." The ground here taken by the dissenting judge, that every vendor is presumed to know whether he has title to the things he sells, is precisely that upon which the subsequent cases have proceeded, and one which affords a solid basis for the doctrine of implied warranty of title.

It is equally clear, that implied warranties in respect to quality, wherever they are held to arise, rest upon a presumption, in the particular case, that the vendor knew of the defect. It is easy to see, that, in respect to all that class of personal chattels which do not enter extensively into the business and trade of a people, and which do not pass rapidly from hand to hand, such as horses, cattle, furniture, and the like, the vendor who, in most cases, would have had the article for some time in possession and use, would be very likely to know whether it was defective, and a presumption of knowledge would, in such cases, as a general rule, be both reasonable and safe. On the other hand, with regard to those goods which are the subject of general traffic, and are habitually purchased, not for use, but to be sold again, no such presumption could fairly arise. This distinction may serve to account, in some degree, for the difference between the civil and the common law rule upon the subject of latent defects in articles sold. The rule of the civil law, viz., *caveat venditor*, was adopted at an early period, and in reference,

as it would seem, rather to those articles which are of general and ordinary use, than to such as enter extensively into the commerce of the country; while that of the common law, viz., *caveat emptor*, originating in a commercial age, and among a highly commercial people, naturally took the form best calculated to promote the freedom of trade. No doubt the common law rule is, upon the whole, wisest and best adapted to an advanced state of society; and yet there is a large class of cases in which that of the civil law would serve to prevent a multitude of frauds. Take, for instance, the article of horses. Few would deny that, as to them, it would be more conducive to justice if the vendor were, in all cases, held to warrant against secret defects. But, as it would be impracticable to discriminate among the infinite variety of articles which are the subjects of sale, the common law applies the maxim *caveat emptor*, as a general rule, to all cases.

It has been frequently, but, as I apprehend, inaccurately said, that under the civil law a warranty is implied from the payment of a "sound price" for the article sold. Although paying a "sound price" may prove that the purchaser was not, it does not prove that the vendor was, cognizant of any defect. It can, therefore, have no tendency to show which of the two parties ought to bear the loss. Where, however, the price paid is less than the value of the article, supposing it to be sound, this shows that the purchaser was apprised of the defect, and that the parties contracted with reference to it. In such cases, therefore, no warranty arises. It is in this aspect alone that the price paid becomes of importance. But because the want of a "sound price" would thus prevent a warranty, it has been illogically inferred that the payment of a "sound price" was the foundation of a warranty. The truth is, that the civil law raises the warranty, because it presumes knowledge on the part of the vendor; and the want of a "sound price" prevents a warranty, because it proves equal knowledge on the part of the vendee.

The theory of the civil and of the common law, in respect to these implied warranties, is entirely different. The civil law holds, that the warranty enters into and forms an integral part of the contract of sale itself, as will be seen by referring to Pothier's definition of a sale, and his statement of the obligation of the vendor to warrant against latent defects, which he

deduces directly from that definition. The definition he gives seems to be somewhat strained for the purpose of embracing that obligation. (See Pothier on Cont. of Sale, Prelim. Art. and Part II, chap. 1, § 4.)

But the common law, with, as I conceive, better logic, derives the obligation from the general doctrine which holds vendors responsible for every species of deception. That this is the true source of this warranty at the common law, will be rendered apparent by reference to three early cases, two of which have been already referred to; viz.: *Dale's Case*, Cro. Eliz. 44; *Furnis* v. *Leicester*, Cro. Jack. 474; and *Cross* v. *Gardner*, Carth. 90; *S. C.* 1 Show. 68. These cases show by what gradations a strong principle of justice overcame at length the technical rules of the common law, and forced the courts to sustain an action for a deceit without any averment or actual proof of willful deception.

It is possible to read, even in the meagre record we have of these three cases, the mental operations of the pleaders, at that remote period, in framing the respective declarations. They were all experimental cases, and probably enlisted the highest legal talent. The declaration in *Cross* v. *Gardner*, as we know, was drawn by Mr. Justice Gould of the King's Bench. This we learn from himself, in *Medina* v. *Stoughton*, Lord Ray. 593. The object of the pleader in each case, evidently was to avoid the necessity of alleging a *scienter*, of which he has no extrinsic proof. In *Dale's Case*, there was no averment, direct or indirect, on the subject of knowledge, and the experiment failed; the pleader having taken too great a stride to begin with, but carrying along with him, nevertheless, one-third of the court. In *Furnis* v. *Leicester*, the word "deceitfully," which implied knowledge, was ventured upon, relying upon the presumption of knowledge to support it; and this experiment succeeded. In *Cross* v. *Gardner*, another step was taken, and a *colloquium* and averment of possession in the plaintiff were resorted to, instead of any allegation of knowledge. In this, also, the pleader was successful.

These are the cases, especially the last, which established, in the English courts, the doctrine of implied warranty of title; and my object in referring to them is to sustain the position I take, that the rule was originally based upon the presumption that a vendor knows whether or not he has title to the things

which he sells. That this was so, is manifest from the kind of declaration used in all these cases, viz.: case for a deceit. Precisely when the form of action was changed, from case to assumpsit, does not appear; but it certainly was not until after the time of Blackstone, because he says: "In contracts likewise for sales, it is constantly understood that the seller undertakes that the commodity he sells is his own, and if it proves otherwise, an action on the case lies against him to exact damages *for this deceit.*" (3 Bl. Com. 165.) It is plain, therefore, that the courts proceeded in these cases upon the ground of presumptive knowledge on the part of the vendor of his want of title.

It has already been shown, to some extent, that implied warranties as to quality, are based, when they exist at all, upon the same assumption. But this will further appear from some of the exceptions to the common law rule of *caveat emptor*. One of these exceptions, which has been generally recognized, is, that upon the sale of provisions, which are purchased, not for the purpose of resale, but to be consumed by the purchaser, there is an implied warranty that such provisions are sound and wholesome. There are two cases in our own courts which show the foundation of this exception. The first is that of *Van Bracklin* v. *Fonda*, 12 John. 468, which was an action to recover damages for selling a quantity of beef as "good and sound," which proved "bad and unwholesome." There was in that case some evidence that the defendant knew the animal to be diseased before it was slaughtered; but the court, in giving judgment, say that "in the sale of provisions for domestic use, the vendor is *bound* to know that they are sound and wholesome, at his peril." Although what the court here says is that the vendor is bound to know the condition of what he sells, yet the subsequent case of *Moses* v. *Mead*, 1 Denio, 378, which was more elaborately considered, shows clearly that the doctrine rests upon a presumption of knowledge on his part. The sale in that case was of 194 barrels of mess beef, which proved to be tainted; and the action was assumpsit founded upon an implied warranty of soundness. The beef was bought, not for immediate consumption, but by merchants for the purpose of being resold. Mr. Mann, who argued for the defendant, did not dispute the general rule, but relied upon the fact that the purchase was not for consumption. The pith of his argument was in this

sentence: "Where the sale is by wholesale, the vendor has *no more opportunity of knowing* their quality (the quality of the provisions sold) than the purchaser." In giving judgment for the defendant, the court proceeded upon this ground, as is evident from the following language of Bronson, Ch. J. After referring with approbation to the case of *Van Bracklin* v. *Fonda*, he says: "But there is a very plain distinction between selling provisions for domestic use and selling them as articles of merchandise, which the buyer does not intend to consume but to sell again. Such sales are usually made in large quantities, and with *less of opportunity to know* the actual condition of the goods, than when they are sold by retail." The implied warranty depends, therefore, in these cases, as in all others, upon the question whether there is reason to impute to the vendor a knowledge of the defects, if any exist.

Another exception to the general rule, which has been recognized in several cases, but with some hesitation and uncertainty, is, that a manufacturer, who sells goods of his own manufacture, impliedly warrants that they are free from any latent defect growing out of the process of manufacture. In regard to the justness of this exception, it would seem, aside from authority, scarcely possible to doubt. If the vendor can be proved to have had knowledge of the defect, and failed to disclose it, all agree he is liable. Is it not reasonable to presume that he who made a thing which has a defect arising solely from the manner in which it is made, is cognizant of that defect? Where the vendor has manufactured the article with his own hands, the inference of knowledge would, plainly, in many cases, be strong enough to charge him even in an action for fraud. But if the manufacturing is done by agents, the general principles of law would hold the principal responsible for those whom he employs. Wherever the vendor, therefore, has himself manufactured the article sold, or procured it to be done by others, if honesty and fair dealing are ever to be enforced by law, a warranty should be implied. The doubts which have been expressed in one or two cases in this State, upon this subject, could, I think, never have arisen, if the courts had kept steadily in view the principles upon which implied warranties rest. This would also have prevented the confusion which pervades the early English cases on the subject of exceptions to the maxim *caveat emptor*. The rule that upon executory contracts for the

delivery of some indeterminate thing at a future day, there is an implied warranty that the article shall be of a fair quality and merchantable; the supposed rule that upon the sale of a thing for a particular purpose, there is an implied warranty that the thing shall be fit and suitable for that purpose, and the like rule that upon the sale of goods by sample, the vendor warrants that the goods shall be equal to the sample, have all been treated as exceptions to that maxim.

The first of these rules may, perhaps, be regarded as in some sense an exception, although the case is not one to which the maxim *caveat emptor* could, by possibility, be supposed to apply. But the other two can hardly be considered as exceptions at all. When a person, desirous to obtain an article for a particular purpose, but not being himself skilled in respect to such articles, applies to one professing to be acquainted with the subject, or who, by his occupation, holds himself out to the world as understanding it, and the latter furnishes what he alleges to be suitable, it is plainly to be inferred that both parties understand the purchase to be made upon the judgment and responsibility of the seller. In view of some such case, one or more of the English judges, at an early day, laid down the broad proposition, that, upon the sale of goods for a specified purpose, the law raised an implied warranty, that the goods sold were suitable for that purpose. In *Blacett* v. *Osborne*, 1 Stark. 384, Lord Ellenborough said: "A person who sells, impliedly warrants that the thing sold shall answer the purpose for which it is sold." Lord Tenterden used similar language in *Gray* v. *Cox*, 4 Barn. & Cress. 108. Best, Ch. J., reiterated the doctrine in *Jones* v. *Bright*, 5 Bing. 533.

But it is obvious that notwithstanding the goods are sold for a particular purpose, if the purchaser himself understands what he wants, and selects such goods as he deems adapted to the intended use, there is no warranty. There can, therefore, be no such general rule as that referred to; but whether there is a warranty or not, must depend upon the circumstances of each particular case. This subject has been placed upon its true basis by two later English cases, viz.: *Chanter* v. *Hopkins*, 4 Mees. & Wels. 399, and *Brown* v. *Edgington*, 2 Man. & Gr. 279. In the last of these cases, Tindal, Ch. J., says: "It appears to me to be a distinction well founded, both in reason and on authority, that if a party purchases an article upon his own *judgment*,

he cannot afterwards hold the vendor responsible on the ground that the article turns out to be unfit for the purpose for which it was required; but if he relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, it seems to me that transaction carries with it an implied warranty, that the thing furnished shall be fit and proper for the use for which it was designed."

This extract shows that these are not cases of implied warranty in the ordinary sense of these terms. The question is one of fact as to the actual contract between the parties. It is, on whose judgment and responsibility was the purchase really made? Implied warranties do not rest upon any supposed agreement in fact. They are obligations which the law raises upon principles foreign to the actual contract; principles which are strictly analogous to those upon which vendors are held liable for fraud. It is for the sake of convenience, merely, that this obligation is permitted to be enforced under the form of a contract. However refined this distinction may appear, its non-observance has led to much of the confusion to be found in the cases on this subject.

The same may be said in regard to the doctrine that an implied warranty arises upon every sale by sample; a doctrine, which, with the most obvious propriety, has been limited by the recent cases in this State (unless the goods are so situated that they cannot be examined by the buyer) to those cases where the circumstances warrant the inference that the seller actually undertook that the bulk of the commodity sold, corresponded with the sample. (*Waring* v. *Mason*, 18 Wend. 425; *Hargous* v. *Stone*, 1 Seld. 73.) In view of the principle settled by these cases, it is equally clear that warranties of this sort, are not strictly implied warranties. They are to be made out as a matter of fact, or they do not exist at all. To infer an actual warranty from the circumstances proved, is one thing; to impute a warranty without proof, is another and different thing, and unless we distinguish between the two, we unavoidably get into confusion.

I will refer to a single case by way of illustration, viz.: *Jones* v. *Bright*, 5 Bing. 533, a leading case and one frequently cited. The facts were that the plaintiff purchased from the warehouse of the defendant, who was himself the manufacturer, copper for the sheathing of a ship. The defendant, who

was informed of the purpose for which the copper was wanted, said: "I will serve you well." The copper, in consequence of some defect, lasted only four months, instead of four years, the usual time. Best, Ch. J., before whom the cause was tried, left it to the jury to determine whether the decay in the copper was occasioned by intrinsic defect, or external accident; and, if it arose from intrinsic defect, whether such defect was caused by the process of manufacture. The jury found that the decay was occasioned by some intrinsic defect, but that there was no satisfactory evidence as to the cause of that defect. The court held the defendant liable. But there is no little difficulty in ascertaining the precise ground upon which the decision was placed. It is evident that the Chief Justice, when he tried the cause, expected to dispose of it on the ground that the defect in the copper grew out of the process of manufacture; for he says in his opinion upon the motion for a new trial: "I declined expressing an opinion at *nisi prius*, but I expected the jury would have found that the article was not properly manufactured, for the testimony of the scientific witnesses was very clear." Still he does not seem willing, entirely to abandon this ground, notwithstanding the verdict was against it, for he goes on to remark: "At all events, the warranty given by them (the defendants) is not satisfied, because the jury found that there is an intrinsic defect in an article *manufactured by them.*"

But the Chief Justice seems to have been driven by the verdict, to seek for some other ground upon which to rest the case. He argues, therefore, to show that the words "I will serve you well," constitute an express warranty. He then adds: "But I wish to put the case on a broad principle. If a man sells an article, he thereby warrants that *it is merchantable*, that it is fit for some purpose. . . . If he sells it for a particular purpose, he thereby warrants it fit for that purpose." Mr. Justice Burrough seems to me to have taken the most sensible view of the case. He says: "I consider this as more a question *of fact* than of law. The question is whether the contract was proved as laid. It was so proved; and after Fisher had introduced the parties and stated the purpose for which the plaintiff wanted the copper, the defendants warranted the article by undertaking to serve the plaintiff well."

This case has been cited, indiscriminately, to prove that upon the sale of manufactured articles, by the manufacturer himself,

there is an implied warranty against defects arising from the process of manufacture; that goods sold for a particular purpose are warranted fit for that purpose, and even that there is an implied warranty in all cases of sale, that the goods sold are fit for some purpose.

The case, I think, was properly decided, on the ground upon which it was placed by Burrough, J. It was this case, more than any other, which has served to create, in the minds of some of our judges, so strong a feeling against exceptions to the maxim *caveat emptor*, that they have been disposed to reject all such exceptions without discrimination. (*Wright* v. *Hart*, 18 Wend. 449; *Hargous* v. *Stone*, 1 Seld. 73.) But if we look at what the English courts have really decided, instead of what some of the judges have loosely said, we should, I think, find less occasion for deprecating their tendency in this respect, towards the doctrines of the civil law, than has been supposed.

But for this hostility to all implied warranties, as to quality, it never could have been doubted that where one sells an article of his own manufacture, which has a defect produced by the manufacturing process itself, the seller must be presumed to have had knowledge of such defect, and must be holden, therefore, upon the most obvious principles of equity and justice, unless he informs the purchaser of the defect, to indemnify him against it. In such cases, if the price paid is entirely below that of a sound article, a presumption would, no doubt, arise, as under the civil law, that the purchaser was apprised of the defect.

In the present case, a portion of the alleged defect in the saw would seem to have arisen from the unsuitableness of the material of which it was made. The rule on the subject, I hold to be this: The vendor is liable, in such cases, for any latent defect, not disclosed to the purchaser, arising from the manner in which the article was manufactured; and if he, knowingly, uses improper materials, he is liable for that also; but not for any latent defect in the material which he is not shown and cannot be presumed to have known.

The judgment should be reversed, and there should be a new trial, with costs to abide the event.

All the judges concurred; COMSTOCK, Ch. J., and DAVIES, J., however, only in the conclusion, reserving their judgment as to some of the propositions in the opinion.

Judgment reversed and new trial ordered.

Carleton et al. v. Lombard, Ayers & Company.

(149 New York. 137.—1896.)

Appeal from judgment of the General Term of the Supreme Court, affirming a judgment in favor of the defendant dismissing the complaint.

O'Brien, J. The plaintiffs sought to recover damages in this action for the breach of an executory contract for the sale of goods. The defendant is a domestic corporation, engaged in refining crude petroleum for sale and export, and both parties to the action were members of the New York Produce Exchange. On the 10th of January, 1887, the parties entered into a contract in writing, which, by its terms, was made subject to the rules of the exchange, whereby the defendant agreed to sell and deliver to the plaintiffs a large quantity of refined petroleum. The following is the material part of the contract in which the kind, quantity and price of the goods are specified, as also the time and place of delivery, in these words:

"Fifty-five thousand cases, ten per cent more or less, each case packed with two of their patent cans, with low screw tops or nozzles and brass labels, containing five gallons each of refined petroleum of their Stella brand, color standard white or better, fire test 76 degrees Abel or upwards, at eight and one-half cents per gallon, cash on delivery. To be delivered in yard free of expense to vessel, to be ready not earlier than the twenty-fifth of January, 1887, not later than the tenth of February, 1887, with twenty-five days to load. Brass labels one-half of one cent each."

It appears that before closing this contract the plaintiffs had received from the firm of Graham & Co., merchants at Calcutta, British India, an offer to purchase a like amount of refined petroleum of the same brand, color, test and packing, to be shipped at the port of New York, not later than March 15, 1887, for their account and risk, on board the British ship Corby, bound for Calcutta. This offer the plaintiffs accepted on the same day that they entered into the contract with the defendant, and immediately after closing it. On or before March 1, 1887, the defendant delivered the oil, packed in the

manner specified in the contract, to the plaintiffs, alongside the Corby at its factory at Bayonne. The delivery by the defendant to the plaintiffs, and by the plaintiffs to their vendees in Calcutta, was thus accomplished by substantially the same act. The rules of the Produce Exchange, which were made part of the contract between the plaintiffs and the defendant, so far as material to the questions involved, were these: (1) The committee on petroleum were authorized and required to license duly qualified inspectors, members of the exchange, for the various branches of that business. (2) Buyers should have the right of naming the inspector, but must do so at least five days before the maturity of the contract. Failing in this, the seller might employ any regular inspector at the buyer's expense, and his certificate that the oil is in conformity with the contract shall be accepted. (3) When goods are delivered to vessel by buyer's orders, the acceptance of them by buyer's inspector shall be an acknowledgment that the goods are in accordance with the contract.

The plaintiffs under the rule named the inspector, who on March 1, 1887, after the cargo was loaded on board the Corby, made and delivered to them a certificate in writing which certified that he had inspected the oil shipped on board the Corby, and stated therein the brand, color, test and gravity of the same which corresponded with the contract. The vessel started upon her voyage, the plaintiffs paid the defendant the purchase price of the oil and then drew upon the parties in Calcutta to whom they had sold, for the price as between them, and their draft was paid. The vessel did not arrive at Calcutta till some time in June, and when she began to discharge the cargo it was found that the cans had become corroded from the inside by some foreign substance in the oil, and so perforated that they did not retain their contents. A large part of the oil was lost by leakage, and the whole cargo was pronounced unmerchantable and finally sold at Calcutta for a small sum, for account of whom it might concern. When the condition of the goods was discovered by the consignees during the discharge of the cargo from the ship, the plaintiffs were notified by cable of the situation and the condition of the oil. They laid these dispatches before the defendant and a long correspondence by cable followed in which the defendant participated and of all of which it had knowledge. The purpose

of it was to ascertain the defect, if any, in the oil and to reach some amicable arrangement. In the end all parties seem to have become satisfied that a large loss had been sustained, and the parties in Calcutta who had paid the plaintiffs for the property called upon them to make good their contract. The plaintiffs in turn called upon the defendant to indemnify them from loss, and it then took the ground that it had in all respects performed its contract and was not liable for the result.

In July, 1888, Graham & Co., in Calcutta, brought suit in the Supreme Court in New York against the plaintiffs to recover their damages. The complaint in the action, after alleging the legal obligation of these plaintiffs to deliver to them a merchantable article of refined petroleum at the port of New York fit for export and transportation by sea in a sailing vessel to India, averred that, in fact, it was not a merchantable commodity, but on the contrary a very large portion of the cans so shipped contained petroleum imperfectly refined, containing water, acids and other foreign substances which would, in the course of transportation, corrode the cans and should have been eliminated therefrom by proper refinement, and the presence of which rendered the article shipped unmerchantable and unfit for transportation. There were various other breaches of the contract alleged not material to state. Notice was given to the defendant to come in and defend the action and it complied with the notice. It participated in the preparation of the defense, the production of proofs, and at the trial was represented by counsel and had every opportunity to resist the claim. The jury, however, rendered a verdict for the plaintiffs in the action and against the defendants, who are the plaintiffs here, upon which a judgment was entered for nearly $50,000. The plaintiffs in this action, upon the refusal of the defendant to indemnify them, paid this judgment and called upon the defendant to reimburse them, and upon its refusal, this action was commenced in March, 1891.

The complaint alleges, as did that in the prior suit, substantially that the oil delivered by the defendant alongside the Corby at Bayonne was not in fact refined merchantable petroleum, but, on the contrary, the cans contained a large proportion of oil imperfectly refined and containing foreign substances, which would in the course of transportation corrode the cans, and which should have been eliminated by proper refinement,

the presence of which rendered the goods unmerchantable and unfit for transportation. That in consequence of this defect the cans, with few exceptions, had become corroded and perforated by the action of the contents, so that they would not, and did not, retain it, and hence could not be delivered as an article of merchandise or commerce at the port of destination. That these defects were latent and of a hidden nature, and such as could not have been discovered by inspection or any examination that was practicable for the buyers to make at the time and place of delivery. The pleading then states with considerable detail the correspondence by cable after the arrival of the Corby at Calcutta; the defendant's connection with it; the action brought against them by the Grahams; the issues therein; the verdict and judgment, and the payment of the same by the plaintiffs who were defendants in that action. The action having been brought to trial, a verdict was directed in favor of the plaintiffs, but the judgment was reversed at the General Term upon a construction of the contract unfavorable to the plaintiffs, and upon exceptions taken at the trial, and a new trial was ordered. On the new trial the plaintiffs' complaint was dismissed on the rulings of the General Term made when the first judgment was before it for review. On the second appeal that court adhered to its former ruling and affirmed the judgment.

The property which was the subject-matter of the contract between the parties was not in existence at the time it was made, but was thereafter to be produced by refinement of the crude material through a manufacturing process by the defendant. It was, therefore, a contract by a dealer with a manufacturer, and is subject to the rules and principles that apply to executory contracts for the sale and delivery of goods when the parties occupy these relations to each other. It is a conceded fact in the case that the oil delivered by the defendant to the plaintiffs alongside the Corby was of the kind and quality described in the written contract. In quantity, brand, color and fire test it corresponded with the terms of the contract; but it is claimed that while all this is true, yet there was a latent or hidden defect in the article so delivered, the result of improper refinement or manufacture, not discernible upon inspection, which rendered the oil unmerchantable and unfit for transportation by sea in a sailing vessel, and that this defect was the cause of the loss which the plaintiffs have sustained. The most im-

portant question in the case is whether the defendant, notwithstanding its written contract, is bound to make good the loss, assuming that it was caused by such defect in the goods. The general rule of the common law, expressed by the maxim *caveat emptor*, is not of universal application, though the exceptions are quite limited; and one of them is the case of a manufacturer who sells goods of his own manufacture, who, it is said, impliedly warrants that they are free from any latent defect growing out of the process of manufacture. The seller in such a case is liable for any latent defect arising from the manner in which the article is manufactured, or from the use of defective materials, of the character of which he is shown or is presumed to have knowledge. This rule and the reasons upon which it rests, or its qualifications and limitations, have seldom been stated in the same form by courts and writers upon the subject, but that it exists as a principle in the law of contracts cannot be doubted.

The leading case in this state is *Hoe* v. *Sanborn*, 21 N. Y. 552. The learned judge who framed the opinion in that case, after stating the rule, proceeds to show the grounds upon which it rests. In his view, while this peculiar obligation is called a warranty for convenience, it does not rest upon any supposed intention of the parties or agreement in fact, but is one which the law raises upon principles foreign to the contract in the interest of commercial honesty and fair dealing, and analogous to those upon which vendors are held liable for fraud. It is quite difficult to reconcile the authorities upon the question, but it may be observed that they recognize the principle that in such cases the seller and buyer do not deal with each other quite at arm's length; that the seller possesses superior knowledge on the subject upon which the buyer is presumed to repose some degree of confidence, and that commercial honesty and fair dealing requires that in such cases the seller be held bound to deliver the article free from secret or latent defects which are actually or presumptively within his knowledge.

The principle was applied, in a later case in this court, to a contract for the sale of seeds of a particular description by the grower. It was there said that as the grower of seeds must be presumed to be cognizant of any omission or negligence in cultivation, whereby they were rendered unfit for use, there was

the same reason for implying a warranty that they were not defective from improper cultivation, as in the case of a sale of an article by a manufacturer that it is free from latent defects. (*White* v. *Miller*, 71 N. Y. 118.)

The latest case that I have been able to find upon the question is *Kellogg Bridge Company* v. *Hamilton*, 110 U. S. 108. The leading cases bearing upon the point, both in this country and England, are there reviewed, and the court stated the principle in these words: "When the seller is the maker or manufacturer of the thing sold, the fair presumption is that he understood the process of its manufacture, and was cognizant of any latent defect caused by such process, and against which reasonable diligence might have guarded. This presumption is justified, in part, by the fact that the manufacturer or maker by his occupation holds himself out as competent to make articles reasonably adapted to the purpose for which such or similar articles are designed.

"When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller as to latent defects of which the latter, if he used due care, must have been informed during the process of manufacture. If the buyer relied, and under the circumstances had reason to rely on the judgment of the seller, who was the manufacturer and maker of the article, the law implies a warranty that it is reasonably fit for the use for which it was designed, the seller at the time being informed of the purpose to devote it to that use."

The principle is distinctly admitted in the opinion of the learned court below, and I do not understand that it is denied by the learned counsel for the defendant. It is strenuously urged, however, that it can have no application to a case like this where the contract is in writing with such ample description of the goods sold. But the obligation attached to an executory contract for the sale of goods by the manufacturer or maker, cannot be changed by the mere fact that the contract has been reduced to writing. The writing, it is true, is deemed to express the whole agreement of the parties, but since this peculiar liability arises from the nature of the transaction and the relations of the parties, without express words or even

actual intention, it will remain as part of the seller's obligation unless in some way expressly excluded. All implied warranties, therefore, from their nature, may attach to a written as well as an unwritten contract of sale. The parties may, of course, so contract with each other as to eliminate this obligation from the transaction entirely. The seller may by express and unequivocal words exclude it and, in like manner, the buyer may waive it. So, also, the parties may provide for a delivery or inspection of the article when made, which will operate to extinguish the liability upon acceptance. (*McParlin* v. *Boynton*, 8 Hun, 449; *S. C.* 71 N. Y. 604.) In this case the parties did provide for an inspection of the oil. The scope and effect of that provision of the contract will be considered hereafter, but, aside from that, there was no language used indicating any intention on the part of the buyer to waive or the seller to exclude the liability of a manufacturer.

The proposition upon which the case turned in the court below, and upon which the judgment is defended here, was thus stated by the learned judge in the opinion at General Term: "It is well settled that when an article is sold under a contract which specifies the qualities which it shall possess—no matter whether the language be a condition or a warranty—that the law will not, except in special cases, imply a warranty or condition that the article has other qualities. A warranty or condition in a contract of sale that the article sold has certain qualities, excludes the implication of a warranty or condition that it possesses other qualities." From the operation of this general proposition it will be seen that the learned judge excepts special cases, which, however, are not designated. In its application to this case the rule thus stated must mean that since the parties have in their contract specified the particular brand, color and fire test of the refined petroleum which was the subject of the sale, the manufacturer's obligation to deliver an article free from latent defects, arising from the process of manufacture which would render it unmerchantable, has been excluded by implication. This is not, we think, the meaning of the rule to which the learned judge referred in the language quoted. The rule means that where parties to a contract of sale have expressed in words the warranty by which they intend to be bound, no further warranty will be implied by law, but that expressed will include the whole obligation of the seller.

(Benjamin on Sales, § 666; *Deming* v. *Foster*, 42 N. H. 165.) Moreover, this principle applies to sales of specific existing chattels and not ordinarily to sales of goods to be made or supplied upon the order of the buyer. There is much confusion in the cases on this subject, arising doubtless from an inaccurate use of the term warranty.

When an article is sold by the owner or maker by the particular description by which it is known in the trade it is a condition precedent to his right of action that the thing which he has delivered, or offers to deliver, should answer this description. But in many cases in modern times the sale of a particular thing by terms of description has been treated as a warranty, and the breach of such a contract a breach of warranty, whereas it would be more correct to say that it was a failure to comply with the contract of sale which the party had engaged to perform. (*Chanter* v. *Hopkins*, 4 M. & W. 404; Benjamin on Sales, § 600.) There are many cases in which such words of description are not considered as warranties at all, but conditions precedent to any obligation on the part of the vendee, since the existence of the qualities indicated by the descriptive words, being part of the description of the thing sold, becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted. (Smith's Leading Cases, vol. 2 [6th Eng. ed.], 27; Schouler's Personal Property, vol. 2, pp. 352, 353.) The tendency of the recent decisions in this court is to treat such words as part of the contract of sale descriptive of the articles sold and to be delivered in the future, and not as constituting that collateral obligation which sometimes accompanies a contract of sale and known as a warranty. (*Reed* v. *Randall*, 29 N. Y. 358; *Coplay Iron Co.* v. *Pope*, 108 N. Y. 232, 236.)

It is not now important to inquire how far, or under what circumstances, the principle stated by the learned judge applies to contracts of sale of goods *in esse* between dealers in which there is an express warranty. It is not, we think, applicable to the obligation of a manufacturer who contracts, as in this case, for a sale of his own product, the condition of which he is presumed to know. It is plain that in the case at bar the plaintiffs intended to buy and the defendant to sell an article of refined petroleum, which should not only correspond to the description in the contract, but should be free from latent defects arising

from the process of manufacture, so as to constitute a thing which, in the commercial sense, would be of some use or value.

It is quite conceivable that the oil might correspond with all the descriptions of the contract, and yet be a useless and unmerchantable thing, in consequence of defects arising from the process of manufacture, in which case the buyer would have the shadow of the thing bought without the substance. The defendant's obligation rests not only upon the terms of the contract, but upon its superior knowledge and the confidence which the buyer placed in its ability to produce a proper article, and hence the relations of the parties are quite different from that of dealers in the article in the market, each possessing equal means of information and opportunity for the detection of latent defects. A strict adherence to the bare descriptive words of the contract would not express the full obligation of the defendant. That the commodity shall be so free from latent defects arising from the process of refining, and which could be guarded against by ordinary care, so as to render it merchantable, is a term to be implied in all such contracts. (Story on Cont. [4th ed.] §§ 836, 837; *Jones* v. *Just*, L. R. [3 Q. B.] 197.)

The plaintiffs were entitled to something more than the mere semblance or shadow of the thing designated in the contract. They were entitled to the thing itself with all the essential qualities that rendered it valuable as an article of commerce and free from such latent defects as would render it unmerchantable. (*Mody* v. *Gregson*, L. R. [4 Ex.] 49.) If the goods in question were in fact unmerchantable in consequence of latent defects arising from the process of manufacture and which the defendant could have guarded against by the exercise of reasonable care, it would be quite unreasonable to hold that the defendant has, nevertheless, performed the contract because it has delivered oil of the same brand, color and test specified. It is quite clear that the words of the written contract do not exclude a liability on the part of the defendant for fraud in the performance, and it is difficult to see how it can affect an obligation of the seller who is also a manufacturer, which is based upon his actual or presumed knowledge of latent defects in the oil, arising from the process of refinement.

In the construction of commercial contracts for the sale and delivery of goods, the courts are not always bound by the literal meaning of words, descriptive of the article, contained in the

contract. It frequently happens in large transactions that the article which is the subject of the contract is described by some vague generic word which, taken strictly and literally, may be satisfied by a worthless or defective article. In such cases the words may mean more than their bare definition or literal meaning would imply and impose upon the seller an obligation to furnish not only the thing mentioned in the contract, but a merchantable article of that name. (*Murchie* v. *Cornell*, 155 Mass. 60.)

If it be true that the defendant in this case delivered alongside the vessel an article which was unmerchantable and unfit for transportation, in consequence of hidden or latent defects arising from the process of manufacture and of which it had or should have had knowledge, in the exercise of reasonable care, it has not, in any just or substantial sense, performed its contract, although the article so delivered was of the brand, color, test and specific gravity called for by the writing. The plaintiffs were not only entitled to the thing described, but to that thing in such condition and so free from hidden defects as to make it available to them as an article of commerce and fit for transportation.

Whether this liability survived the delivery and inspection of the goods remains to be considered. When the rules of the exchange are read into the contract it is provided that the acceptance of the petroleum by the buyer's inspector shall be an acknowledgment that the goods are in accordance with the contract and, as we have seen, the inspector so certified. The inspector was not the agent of either party, but an umpire selected to determine whether the article delivered alongside the Corby corresponded with the contract. The parties, in effect, submitted a certain question to the decision of the inspector, and that was whether the oil corresponded in brand, color and fire test with the contract. He was not authorized to determine whether there was or was not any hidden or latent defects in the article at the time and place of the delivery which would render it unmerchantable. That question was not within the fair scope or purpose of the inspection, and the certificate on this point does not conclude the parties. If, however, the defects which the plaintiffs now claim existed at the time of delivery and which they claim to have produced the damages, were discernible upon the inspection contemplated by

the contract, they were not hidden or latent defects within the meaning of the rule, and in that case the certificate would conclude the parties. If in executing the power to determine the brand, color, fire test and gravity of the article delivered, any other defect which would render it unmerchantable would necessarily appear, the plaintiffs are concluded as to that defect by the certificate of the inspector. (*Studer* v. *Bleistein*, 115 N. Y. 316; *Monitor Milk Pan Co.* v. *Remington*, 41 Hun, 218.)

If I am right in these several propositions, it must follow that the plaintiffs were entitled to prove upon the trial, if they could, that the refined petroleum delivered by the defendant alongside the Corby, though corresponding with the description of the article in the contract, had in it some hidden or latent defect, not discernible by the inspection provided for, which then and there rendered it unmerchantable.

At the trial the plaintiffs' counsel offered in evidence the judgment roll in the action against them by Graham & Co., already referred to, as proof upon some of the issues in the case. He also offered to prove what actually took place at that trial and what questions were actually litigated and submitted to the jury. The evidence was objected to by the counsel for the defendant, excluded by the court, and the plaintiffs' counsel excepted.

We have seen that the defendant had knowledge of all the correspondence by cable between the plaintiffs and the parties in Calcutta; that it was notified of the commencement of the action, and that it participated in the trial. In so far as the issues actually litigated in that case are identical with the issues involved in this, the judgment is binding upon the defendant in the same way as if it had been a party upon the record. (*O. T. N. Co.* v. *C. T. E.*, 144 N. Y. 665; *Village Port Jervis* v. *First National Bank*, 96 N. Y. 550; *City of Rochester* v. *Montgomery*, 72 N. Y. 65; *Albany City Savings Inst.* v. *Burdick*, 87 N. Y. 40, 45; *Andrews* v. *Gillespie*, 47 N. Y. 487; *Heiser* v. *Hatch*, 86 N. Y. 614; *Chicago* v. *Robbins*, 2 Black. 418.) What the plaintiffs sought to prove by this record was that at the time of delivery of the petroleum by the defendant alongside the Corby it was not properly refined, but contained water, acid and other foreign substances that rendered it unmerchantable, and that, in consequence, they were cast in damages at the suit of the parties in Calcutta, the delivery in both cases being substantially

identical in point of time, and the amount of the damages. Graham & Co. could not have recovered against the plaintiffs for any change or deterioration in the oil after it was delivered, or that was due to the voyage, or the perils of the sea, since the goods were at their risk. The plaintiffs offered to prove that the recovery did not proceed upon the ground of any express warranty or any other ground embraced within the pleadings other than the unmerchantable condition of the oil when delivered at the vessel. They were not confined to the record in order to show the point passed upon, but could show by parol proof what questions were actually litigated and decided. (*Doty* v. *Brown*, 4 N. Y. 71; *Kerr* v. *Hays*, 35 N. Y. 331; *Bell* v. *Merrifield*, 109 N. Y. 211; *Adams* v. *Conover*, 87 N. Y. 429; *Smith* v. *Smith*, 79 N. Y. 634; *Lewis* v. *O., N. & P. Co.*, 125 N. Y. 348; *Shaw* v. *Broadbent*, 129 N. Y. 114; *Davis* v. *Brown*, 94 U. S. 423; *Russell* v. *Place*, id. 606.) It is quite true that the record would not prove that the defects were latent or such as would not be disclosed by the inspection contemplated by the contract, since that question was not involved on the former trial, and the plaintiffs did not offer it for that purpose. It could not be excluded, however, because it did not prove the plaintiffs' entire case. If it proved any material fact in support of it, it was admissible. It did, we think, establish, as against the defendant, the fact that the oil, when delivered alongside the Corby, was unmerchantable, since that was the ground upon which the parties in Calcutta recovered the damages, as we must assume from the present condition of the record. The plaintiffs were of course bound to show by other proof that the defects which rendered the goods unmerchantable were latent, and such as would not be disclosed by the inspection.

The plaintiffs offered some proof at the trial tending to show that the defendant, from the manner in which the goods were packed as well as from other sources, knew the destination of the cargo in question, but it was objected to and excluded under exception. We think that the proof was admissible. It was a circumstance surrounding the transaction, not conflicting with the terms of the contract, and might have some bearing on the defendant's obligation to deliver an article of refined petroleum free from latent defects that would render it unmerchantable and upon the degree of care that it was bound to use to that end.

One of the qualities which the oil in question should possess was forty-four degrees Beaumé, specific gravity. This was introduced into the contract by the adoption of the rules of the exchange. It is quite possible that an article of commerce, such as petroleum, possessing all the qualities and sustaining all the tests specified in this contract, may be a merchantable commodity according to the custom of the trade, irrespective of any other consideration or of any latent defect. But that proposition is one of fact rather than law, and, if true, it is difficult to see how a recovery could have been had, upon the grounds stated, by the parties in Calcutta. The defendant having had an opportunity to litigate that question once may be bound by the result, but, in any event, it cannot be affirmed as matter of law, upon the evidence in the record, that the article delivered was merchantable.

Our conclusions with respect to the questions in the case may be briefly summarized.

1. The defendant was bound to deliver an article of refined petroleum that was free from latent or hidden defects that rendered it unmerchantable at the time and place of delivery, and that could have been avoided or guarded against in the process of refinement or in the selection of the raw material by reasonable care and skill.

2. This obligation survived the acceptance if the latent defects were such as would not appear upon an inspection to ascertain whether the oil delivered corresponded with that described in the contract.

3. The judgment roll in the former action was admissible in evidence for the purpose and upon the ground already stated.

4. The plaintiffs were entitled to show that the defendant knew the destination of the cargo of oil designated in the contract.

The judgment must, therefore, be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

BIERMAN ET AL. v. CITY MILLS CO.

(151 New York, 482.—1897.)

GRAY, J. The plaintiffs brought this action to recover damages of the defendant for a breach of warranty in the sale of felt cloths; and, as there was no written contract at the time, it is essential to know the facts and circumstances, under which the sales were made. The plaintiffs were engaged in business in the city of New York, as manufacturers of clothing. The defendant, a Massachusetts corporation, was engaged in the business of the manufacture and sale of felt goods. The plaintiffs alleged that the defendant, through its lawfully authorized agent, had represented to them that it manufactured a certain kind of cloths, fit for their use in the manufacture of coats and had requested them to purchase some. They further alleged that, relying on the representation, they had purchased such cloths and had manufactured them into clothing; that they subsequently discovered that the cloths were "damaged, of an inferior quality, rotten, and unfit for any purpose whatever," and that the defendant had concealed the defects from the plaintiffs. They alleged that the defect was a latent one and not discoverable by inspection, and was indicated by wear; that many of the goods sold by the plaintiffs had been returned to them and that they had on hand a number of said coats, which they had been unable to dispose of. The answer denied that the defendant had made any representations to the plaintiffs, as alleged, and denied the other allegations of the complaint respecting the cloths sold, and set up as a defense that the goods purchased by the plaintiffs were first-class articles of their kind and suitable for the manufacture of low-priced coats. Upon the trial of the issues, the plaintiffs gave evidence that they had not purchased felt goods to be manufactured into clothing, until they made the purchases from the defendant; which occurred in the spring of 1890 at the plaintiffs' place of business in New York. The purchase was made through a Mr. Nichols; who showed them a sample of the cloth and stated that it would make a splendid ulster; that it wore like buckskin and that he had an ulster made from the goods which he had worn for two years. Upon these statements, and at the

price of a dollar a yard, the plaintiffs told him that, "if he could warrant the goods," they could use a very large quantity. Mr. Nichols said, "he would warrant it to wear" and, thereupon, plaintiffs told him to send in a few pieces of the goods to be made up into a lot of ulster samples; and orders were then and subsequently given for cloths to be made up into ulsters for the fall trade, which were filled by the defendant. Plaintiffs gave evidence that they entirely relied upon Mr. Nichols' statements as to the quality of the goods and had no knowledge regarding the wear of the cloth, when manufactured into ulsters. Plaintiffs proceeded with the manufacture of these goods through the summer months, to the extent of 1,326 ulsters; of which they sold 1,027 throughout the country. Subsequently, ulsters were returned to the plaintiffs in a damaged condition, with holes in them, or "broken," or with "tender places" in them. The number of coats returned in a damaged condition was 200. The custom of the plaintiffs, when goods were received, was to examine them before sending them out to be manufactured into garments and then, when returned, the garments are again thoroughly examined. Witnesses, familiar with felts, testified as to how they were made and that, unless made with stocks or fibers sufficiently long to hold the short stocks or fibers together, upon exposure, the stocks will "creep," or draw away from each other. They testified, upon examining the ulsters in question, that the greater proportion of the stocks, from which they were made, had been short stocks; that after exposure, where the felt is not properly worked, the short stocks draw away from the long stocks and that the breaks in these ulsters were attributable to that cause. There was also testimony by a dealer in felt goods, who was familiar with the process of manufacturing and who had sold felt goods for overcoatings, that if made of proper materials, they would wear well and that the way of testing felt for durability and quality was only by actual wear; unless "you try every square inch of the goods." At the conclusion of the plaintiffs' evidence, they had shown that the felt cloths, which they had purchased of the defendant, when made up into these overcoats and sold to customers, had proved, at least to a certain extent, to be so defective in their manufacture and were such "tender" goods, that holes, or breaks, appeared in the garments; that 200 of them had been returned and 299 were left unsold and were of no value. If their evidence is to

be believed, these defects resulted from improper processes of manufacture and were only discoverable after exposure upon being worn. On behalf of the defendant, there was evidence to the effect that Nichols had never been in its employ and, upon his examination, he denied the representations attributed to him by the plaintiffs. He admitted that he had said that this felt cloth was a good thing for an overcoat and that he knew it was to be used for that purpose by the plaintiffs. He testified that he was not a manufacturer of felts, and that the goods he sold to the plaintiffs were to be delivered by the defendant. There was also evidence for the defendant, given by its superintendent, that the felt delivered was a reasonably merchantable article for the price and that there was an ordinary and easy test for detecting the tenderness of the materials by pulling it in a certain way. A manufacturer of felts, examined for the defendant, testified that he attributed the "creeping" in the goods to a great extent to the rubber linings, which the plaintiffs had added to the coats in manufacturing them.

When all the evidence was in, on motion of the defendant, a verdict was directed in its favor and the request of the plaintiffs for leave to go to the jury upon the questions of fact; upon the question of whether there was an express or implied warranty and upon the question of the damages, was denied and an exception was taken to that denial. The General Term affirmed the judgment entered at the Trial Term and we are required upon this appeal, as the main question, to consider the correctness of the disposition made of the case by the trial court. Although the plaintiffs failed to sustain their allegation that the defendant had made certain representations to them respecting the goods, through an agent authorized to make the same, and, therefore, failed to establish an express warranty on the part of the defendant, their complaint contained, by a liberal construction, a sufficient cause of action for the recovery of damages for the breach of an implied warranty that the felt goods sold were fit for the plaintiffs' business in the manufacture of overcoats and that they were merchantable and free from any remarkable defect. The plaintiffs proved no custom to the effect that such sales were usually attended with a warranty and, therefore, in the absence of such proof and because of the failure to show any express authorization

by the defendant to Nichols to sell, it cannot be said that any express warranty accompanied the sale. Nor did the ratification of Nichols' act, through the adoption of the sale by the delivery of the felts, bind the defendant to make good his warranty, or all of his representations. The rule is well settled that ratification must be with full knowledge of the agent's acts. Even if Nichols had been employed to sell the goods, unless he was given express power to warrant, he could not give a warranty which would bind his principal; unless the sale was one which was usually accompanied with warranty. (*Smith* v. *Tracy*, 36 N. Y. 78.) In *Wait* v. *Borne*, 123 N. Y. 592, we held that, "the idea upon which is founded the right to warrant, on the part of an agent to sell a particular article, is that he has been clothed with power to make all the common and usual contracts necessary or appropriate to accomplish the sale of the article intrusted to him. And if in the sale of that kind or class of goods thus confided to him, it is usual in the market to give a warranty, the agent may give that warranty in order to effect a sale, and the law presumes that he has such authority. If the agent, with express authority to sell, has no actual authority to warrant, no authority can be implied where the property is of a description not usually sold with warranty."

The question here, however, is one of a sale, where the seller was the manufacturer of the article sold, and the contract being executory in its nature and for the delivery of something of a particular kind, there was the implied warranty, or promise, that the article to be delivered should be merchantable and free from any remarkable defect. Mellor, J., in *Jones* v. *Just*, L. R. 3 Q. B. 197, after reviewing decisions illustrative of when the rule of *caveat emptor* does or does not apply in sales, stated as one of the results, as follows: "Where a manufacturer undertakes to supply goods, manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article." The same principle was laid down in *Howard* v. *Hoey*, 23 Wend. 350, and in *Hoe* v. *Sanborn*, 21 N. Y. 552, with respect to the obligation of a seller, under an executory contract to deliver an indeterminate thing of a particular kind, that it shall be free from any remarkable defect. In *Kellogg Bridge Co.* v. *Hamilton*, 110 U. S. 108, after

a review of the leading cases bearing upon the point, it was held, that "when the seller is the maker or manufacturer of the thing sold, the fair presumption is that he understood the process of its manufacture, and was cognizant of any latent defects caused by such process and against which reasonable diligence might have guarded. . . . When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller as to latent defects of which the latter, if he used due care, must have been informed during the process of manufacture. If the buyer relied, and under the circumstances had reason to rely, on the judgment of the seller, who was the manufacturer or maker of the article, the law implies a warranty that it is reasonably fit for the use for which it was designed, the seller at the time being informed of the purpose to devote it to that use." Quite recently, in the case of *Carleton* v. *Lombard*, 149 N. Y. 137, which was an action to recover damages for the breach of an executory contract for the sale of petroleum, produced by the defendant through certain manufacturing processes, we had occasion to consider the question of the liability of the seller for any latent defect arising in the process of the manufacture and the principle of the decisions in *Hoe* v. *Sanborn*, *supra*, and in *Kellogg Bridge Co.* v. *Hamilton*, *supra*, was affirmed. We held there that the maxim *caveat emptor* does not apply to the case of a manufacturer, who sells goods of his own manufacture, and that in such a case, he is liable for any latent defects arising from the process of manufacture, or in the use of defective materials, upon the ground of an implied warranty. In *Hoe* v. *Sanborn*, *supra*, Selden, J., commented upon this exception to the general rule and held it to be a just one, using this language: "Wherever the vendor, therefore, has himself manufactured the article sold, or procured it to be done by others, if honesty and fair dealing are ever to be enforced by law, a warranty should be implied."

The principles of adjudged cases apply to the one before us. The defendant was the manufacturer of the article, which it sold to the plaintiffs, and the circumstances of the case were such as to imply a promise on its part that the article, which it manufactured and delivered to the plaintiffs, should be free

from any latent defect. It was under the obligation to furnish an article, not of the higher quality necessarily, but one that was merchantable and free from any remarkable defect arising from the process of manufacture. Although there is no evidence that Nichols was expressly empowered to represent the defendant in the transaction, the adoption of his assumed agency to sell its product charged it with knowledge of the use to which that product was to be put and imposed the duty of delivering goods, which should be merchantable and reasonably fit for that use, and a consequent liability for a failure, attributable to defects in the processes of manufacture or in the materials employed. We must differ with the General Term in the supposition, as expressed in the opinion, that there was no evidence that the goods could not be made into coats which would stand the wear of ordinary felt cloths and, therefore, that it was not shown that the goods were unmerchantable; and in the further supposition that the strength of the goods could have been tested in the ordinary manner and that there was no latent defect discoverable upon use. The learned justices have overlooked the evidence in behalf of the plaintiffs in these respects. To be sure, that may have been the effect of the evidence introduced on behalf of the defendant; but it was in conflict with the plaintiffs' evidence. If the evidence of the plaintiffs is to be believed, the defendant improperly manufactured the felt cloth, or certainly some of it, which was delivered to the plaintiffs, by using what was called too short stock, or shoddy; as a consequence of which the cloth was "tender" and "uneven" and liable to separate, and "breaks," or holes, would appear upon exposure by wear. The evidence tended to show, on behalf of the plaintiffs, that the defect in the cloth was not discoverable upon inspection, and could not be tested as to its durability and quality, except by actual wear. The use of improper stock in the manufacture of the cloth might only make it tender and unserviceable in particular places and, therefore, this was not a case where the plaintiffs could be said to have been concluded by their acceptance and retention of the cloth for manufacturing into ulsters. The obligation of the defendant would survive the plaintiffs' acceptance of the goods, if the latent defects were not discoverable upon inspection. Upon all the evidence, the case should have been submitted to the jury, to determine whether there had been a breach of an

implied warranty that the felt cloth should be merchantable. It was for them to say whether it was unmerchantable and unfit for plaintiffs' purposes, because of the use of defective material and, if they believed the evidence to that effect and that the defect was not discoverable by the plaintiffs upon the usual and ordinary inspection and tests in such cases, they would be justified in awarding damages to the plaintiffs; measured by the loss shown by them to have been actually sustained, in the return upon their hands of defective ulsters, as well as in the manufactured coats left on hand, if unsalable because valueless through defects in the material from which made.

For the error, therefore, committed by the trial court in directing a verdict for the defendant, there must be a new trial of the issues, wherein the cause may be submitted to the jury upon the evidence. Some of the rulings upon the admission and rejection of evidence are open to the criticism of excessive strictness against the plaintiffs, if not actually erroneous; but as there must be a new trial, they will not be discussed.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

DOUNCE v. DOW ET AL.

(57 New York, 16.—1874.)

LOTT, Ch. C. The defendants in their answer allege, as a ground of counter-claim, that the note on which this action was brought was given for a quantity of iron bought by them of the plaintiff which, on delivery, was worthless; and as the decision to be reached by us is to be settled and determined by the construction to be given to the contract between the parties, it is deemed proper to set it forth as alleged in the answer; that, after stating that the defendants for a long time prior to the 12th day of February, 1869, (the date of the note), and up to that time had been and then were extensively engaged in the making and manufacturing and selling of iron castings for mowing machines, threshing machines and other farming and

mechanical implements, which was well known to said plaintiff, averred "that said note was so made, executed and delivered by said defendants to said plaintiff for the purchase-price of ten tons of XX pipe iron which had been theretofore ordered by said defendants from said plaintiff; that the kind of iron so ordered as aforesaid was the very best quality of iron, bringing the highest price in the market, and particularly valuable in said defendants' manufacturing business for its tenacity and toughness, of well defined and established reputation, qualities and characteristics; and which said ten tons of XX pipe iron, of said tenacity, toughness, quality and characteristics, said *plaintiff had agreed* to deliver to said defendants within a reasonable time, and which *should be of a quality suitable and proper for use in said defendants' manufacturing business;* and that such note was given for no other consideration whatever, and was so made, executed and delivered as aforesaid *after* such iron had been ordered as aforesaid by said defendants, and *before* the same had been delivered by said plaintiff, or received by said defendants, and that, thereafter, said plaintiff delivered to said defendants ten tons of iron which was apparently of the kind and quality ordered as aforesaid, but which was in fact brittle, rotten and entirely worthless, and of no value whatever to said defendants."

It is then further averred "that said defendants had melted, mixed and mingled about five tons of the iron so delivered to them by said plaintiff with other and valuable iron in the making and manufacturing of such iron castings for mowing machines, threshing machines and other farming and mechanical implements, and in the making and manufacturing of such machines and farming and mechanical implements, in the making and manufacturing of which said defendants were engaged as aforesaid before they, said defendants, had any knowledge that such iron so delivered to them as aforesaid by said plaintiff was brittle, rotten, entirely worthless, and of no value whatever to them, said defendants."

"That, immediately after ascertaining the quality of the iron so delivered to them as aforesaid by said plaintiff, said defendants notified said plaintiff of the deficiency in the quality and character of such iron, and requested said plaintiff to take away the balance of said ten tons of iron to wit: about five tons which had not been melted, mixed and mingled with other iron as afore-

said, but that said plaintiff has never complied with such request of said defendants in this regard; and said defendants have at all times been, and still are, ready and willing to deliver said balance of such iron to said plaintiff, and that they have since held, and still hold, the same for him and subject to his order, of which said plaintiff has, at all times since, had notice."

The contract, as above stated, is not merely for the delivery of iron classified and known as "XX pipe iron," and the iron of that designation and name, but that it "should be of a quality suitable and proper for use in said defendants' manufacturing business." It was an express agreement or warranty that it should be of that specified or designated quality.

It was admitted by the plaintiff, on the trial, "that the iron furnished to the defendants by the plaintiff was so furnished and delivered upon a previous contract made between the parties, and that the note in suit was given in pursuance of the contract set up in the answer;" and, also, "that the plaintiff knew what was the business of the defendants and that the iron to be furnished was to be used in that business." It also appears, by the proof, that the iron delivered was not of the quality agreed to be furnished, and that the allegations in the answer in reference thereto, and as to its use and the action of the parties after the discovery of its quality are substantially correct. It appears that the iron, after it was received by the defendants, was used continuously for about a month without any previous test by them of its quality; such test was easy and practical, without melting and without expense, by the use of a sledge in breaking it; but its quality could not be told "by its looks," as "all pig irons look pretty much alike."

After the testimony was closed, the court "held and decided that the contract under which the iron in question was bought was an executory contract; that the defendants, under this contract, were bound to examine and test the iron upon its receipt by them and before using it; that having used the iron, or a large portion of it, without testing or examining it, they must be held to have accepted it, as complying with the terms of the contract, and thus to have precluded themselves from any claim for damages for a breach of the contract by reason of any defect which they might have discovered by such examination and test." An exception to this ruling and decision was taken, which raises the only question I deem it necessary to consider. Upon

the application of it to the facts of the case, as above set forth, a verdict was directed in favor of the plaintiff on which judgment was entered. The General Term affirmed it. The judge who gave the opinion of the court on its affirmance, after referring to the ruling and decision above specially set forth, said: "We think the ruling at the circuit was clearly right, as the adjudications stand. It clearly appears from the evidence that the defendants might have ascertained the quality of the iron. They had abundant opportunity to do so, that they omitted to do so was their own neglect, and whether this neglect was in accordance with the usual custom or not makes no difference. The case seems to be entirely disposed of by the principles laid down in *Reed* v. *Randall*, 29 N. Y. 352;" and under a view of the law as there expressed, and the assumption that the doctrine of that case was applicable to this, a new trial was denied. That assumption was unauthorized. It appears by a reference to the facts, as stated in the report of that case and the prevailing opinion of Judge Wright, that the executory agreement of sale was held not to constitute an *express* warranty that the tobacco (which was the article sold), should, when delivered, be well cured and in a good condition; but that the sale was of "a particular thing by its proper description merely," which the law *implied* should be, when furnished, of a merchantable quality. He further said: "A warranty, then, cannot be predicated upon the contract alleged in the complaint, and the rules of law by which the rights of parties in respect to warranties are regulated are inapplicable. A breach of the contract was not a breach of warranty, but a mere non-compliance with the contract that the defendant had agreed to fulfill." He then proceeds to consider the case on the theory or principle that it was an executory contract but not of an express warranty, and reached the conclusion that the remedy of the vendee in such a case, to recover damages on the ground that the article furnished does not correspond with the contract, does not survive the acceptance of the property by the vendee, after opportunity to ascertain the defect, unless notice has been given to the vendor or the vendee offers to return the property; and held that its retention by the purchaser was an assent on his part that the contract had been performed.

Assuming that I am correct in construing the agreement alleged in the answer of the defendants, above set forth, to be a

contract of *express warranty*, it is clear that the case of *Reed* v. *Randall*, *supra*, which controlled the decision of the Supreme Court in this, is not applicable to it. The rule defining the rights and duties in a case of *express* warranty, in an executory contract of sale, has been lately considered and decided by the present Court of Appeals, in *Day* v. *Pool*, 52 N. Y. 416, etc., the late Judge Peckham giving the prevailing opinion, and it is there held (as correctly and tersely expressed in the headnote of the case) "that the vendee, in an executory contract of sale, with warranty as to the quality of the article contracted for, upon the receipt of the article and the subsequent discovery of a breach, is not bound to return, or offer to return, the property, but may retain and use the same and have his remedy." The question is examined with care and ability. The principal authorities bearing on the question, including those of *Reed* v. *Randall*, *supra*, and *McCormick* v. *Sarson*, 45 N. Y. 265, and cases there referred to, are considered, and, in reference to those, the learned judge says: "Neither was a case of express warranty, and each one that speaks upon the subject expressly excepts the rule there laid down, from a case of warranty, as inapplicable." It may also be proper, in view of the nature and character of the defect of the iron, as disclosed by the evidence in the present case (it being such as not to be discovered by inspection merely), to add that the learned judge also said, that "the purchaser, in an executory sale, could not rely upon a warranty as to open, plainly apparent defects, any more than he could in a sale *in presenti*," so that the extent of the decision might not be misapprehended.

The views expressed by the learned judge accord with my own conviction of the true rule and principle of law applicable to the question, and being concurred in by a majority of the court (although dissented from by three of his associates), must control us in our decision.

It follows that the judgment appealed from must be reversed and a new trial ordered, costs to abide the event.

All concur.

Judgment reversed.

DOUNCE v. DOW ET AL.

(64 New York, 411.—1876.)

PLAINTIFF was a dealer in pig metals, and defendants were manufacturers of castings for agricultural implements. In response to an order from defendants for ten tons of "XX pipe iron," the plaintiff shipped to defendants said quantity branded and billed as "XX pipe iron," and defendants sent plaintiff their note in payment therefor. When the castings made from the iron came to be used, they were found to be brittle and worthless, and the pipe iron itself on examination was found to be brittle, rotten and worthless.

In an action upon the note, the defendant set up as a counterclaim the damages sustained by the use of the iron. The court directed a verdict for plaintiff for the amount of the note, and was sustained by the General Term of the Supreme Court.

CHURCH, Ch. J. The article ordered was "XX pipe iron," and the same was forwarded and billed as such. This was a warranty of the character of the article within the decision in *Hawkins* v. *Pemberton*, 51 N. Y. 198, which modified to some extent, the earlier decisions of *Seixas* v. *Woods*, 2 Caines, 48, and *Swett* v. *Colgate*, 20 J. R. 196. The words "pipe iron" referred to the furnace where manufactured, and "XX" to the brand indicating the quality. The plaintiff was not a manufacturer, but a dealer in "pig metals," and was not presumed to know the precise quality of every lot of pigs bought and sold by him, bearing that brand, and hence cannot be held to have warranted that the pigs in question were of any certain quality. (*Hoe* v. *Sanborn*, 21 N. Y. 552.) There was no fraud. Both parties supposed, doubtless, that the iron was first quality for the purpose for which it was intended. But it is not enough that the plaintiff knew such purpose. (34 N. Y. 118.) The defendants should have exacted a specific warranty, and then both parties would have acted understandingly. If the defendants had ordered XX pipe iron, which was tough and soft, and fit for manufacturing agricultural implements, and the plaintiff had agreed to deliver iron of that quality, a warranty would have been established which, probably, within the case

of *Day* v. *Pool*, 52 N. Y. 416, would have survived the acceptance of the article. Here both parties acted in good faith. The defendants ordered simply XX pipe iron, supposing that such iron was always tough and soft. The plaintiff forwarded the iron under the same impression. The iron proved to be brittle and hard, and the question is, which party is to bear the loss? The plaintiff (in the absence of fraud) was only bound by his contract, which was to deliver XX pipe iron, and we are now assuming that such iron was delivered. If so, he was relieved from liability. The only other liability which can be claimed that he incurred was of an implied warranty that the iron was merchantable, and this could not be affirmed unless the contract was executory. (2 Kent's Com. [11th ed.] note *c*, p. 634.) Without inquiring whether such a warranty would be implied under the circumstances of this case, or if it would, what in this case the term "merchantable" would import, it is sufficient to say that the defendants, by using a large portion of the iron after an opportunity to examine and ascertain whether it was merchantable, must be deemed to have accepted it, and to have waived the alleged implied warranty within the general rule which, to this extent, is not impaired by *Day* v. *Pool*, *supra*.

The only serious question in the case is, whether the court erred in directing a verdict. There was, as we have seen, an express warranty that the iron was XX pipe iron, and there was some evidence, although slight, that it was not. It is claimed that this point was waived. The counsel for the defendants asked to go to the jury upon several questions, but did not include among them the question whether this warranty was broken. It must, I think, be assumed that when a party requests that certain specified questions be submitted to the jury, for which there is no valid ground, that he intends to waive the submission of other questions. (43 N. Y. 85, and cases cited.)

Regarding this point as waived, the requests made to submit to the jury were properly denied.

The ruling in rejecting the letter of the 28th of March, 1868, to the defendants' predecessors, with this point out of the case, was not erroneous. That letter was not a warranty that the iron in question was tough and soft, but might have been admissible as a declaration of the party, if the iron had not been XX pipe iron. The same brand of iron is not always of the same quality, and the statement, the year before, by the plaintiff that he

was receiving iron of that brand, which was tough and soft, would not inure as a warranty that all the iron which he might thereafter sell of that brand was of that quality.

We think that the judgment must be affirmed.

All concur; ANDREWS, J., concurring in result.

Judgment affirmed.

AMERICAN FORCITE POWDER MANUFACTURING CO. v. BRADY.

(4 Appellate Division, 95.—1896.)

VAN BRUNT, P. J. This action was brought to recover an alleged balance due upon an account for goods, wares and merchandise, claimed to have been sold by the plaintiff to the defendant. The answer admitted the purchase of certain goods specified in the complaint during the times therein stated, and alleged, as a counterclaim and set-off, that the goods so purchased by him were for blasting purposes, of which fact the plaintiff was well aware at the time of the sale, and sold to defendant said goods to be used for such purpose, warranting the same to be fit and suitable therefor, and that, relying upon such warranty, the defendant accepted the goods; that a portion of the goods were entirely worthless and unfit for such purpose, and the defendant in the use thereof sustained great damage, for the amount of which judgment was prayed.

At the commencement of the trial, when objection was taken to certain testimony as to the use of this merchandise, the court laid down the rule of law which was to govern during the progress of the trial, and stated that he did not understand that there was any express warranty, except that the defendant bought the powder for blasting, and the plaintiff knew it was for blasting, and if the plaintiff sold it for blasting, there was an implied warranty that it was suitable for blasting. Exception was taken to this ruling, and the trial proceeded upon the basis that if the plaintiff knew that these goods were to be used for blasting, there was an implied warranty that they were suitable for such purpose.

There is no proof that the defendant understood the plaintiff to be the manufacturer of these goods. Indeed, the evidence shows that he knew that the plaintiff was simply a dealer in the goods, purchasing them from the manufacturers and delivering them to purchasers in the same condition and in the same packages in which they purchased them from the manufacturers.

As we understand the law to have been established by a long line of decisions, the latest of which seems to be the case of *Gentilli* v. *Starace*, 133 N. Y. 140, it is that where the vendor is not the manufacturer, and the purchaser knows this fact, in the absence of proof of an express warranty or of fraud or deceit upon the part of the seller, he is not responsible for latent defects. In the case of a purchase of this description, the purchaser knows that the dealer relies upon the character and reputation of the manufacturer, and the purchaser has the same opportunity of determining as to any latent defects in the merchandise as the seller, and consequently under such circumstances the rule of *caveat emptor* applies. But where goods are manufactured for a specific purpose, there the person manufacturing them has the opportunity of knowing how the goods are made, whether there are any latent defects or not, and the law raises an implied warranty upon the part of the person manufacturing goods for a specific purpose that they are suited for that purpose.

Our attention is called by the learned counsel for the respondent to the cases of *Swain* v. *Schieffelin*, 134 N. Y. 471 and *Van Wyck* v. *Allen*, 69 id. 61, as establishing the proposition that where goods are sold for an express purpose known to the vendor, there is an implied warranty against latent defects rendering them unfit for such purpose. The cases cited, however, establish no such proposition. *Swain* v. *Schieffelin* was the case of a manufacturer; and in *Van Wyck* v. *Allen* there was an express warranty.

The rule seems to be well established that a dealer does not impliedly warrant against latent defects, except where the sale of the article by him is in and of itself legally equivalent to a positive affirmation that the article has certain inherent qualities inconsistent with the claimed defects, as in the case of the sale of provisions for domestic use.

We think, therefore, that the learned court erred in holding

that there was an implied warranty, the goods in question not having been manufactured by the plaintiff.

The judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

RUMSEY, WILLIAMS, O'BRIEN and INGRAHAM, JJ., concurred.

Judgment reversed and new trial ordered, costs to appellant to abide event.

VAN BRACKLIN v. FONDA.

(12 Johnson, 468.—1815.)

IN error, on *certiorari* to a justice's Court.

Fonda, the plaintiff in the Court below, declared against *Van Bracklin*, for that he had sold him a quarter of beef, as good and sound; that it was not good and sound, but bad and unwholesome.

It appeared in evidence, that *Fonda* purchased of *Van Bracklin* a quarter of beef, for his own use; that the cow had eaten, shortly before she was killed, a very large quantity of peas and oats, and that she was slaughtered for fear she would die in consequence of her having eaten them; and it was proved, also, that those who ate of the beef were generally made very sick, and that one of *Fonda's* servants was sick for two weeks from eating it. The jury found a verdict for the plaintiff below, for five dollars damages.

PER CURIAM. The verdict settles the facts, that the beef sold was unsound and unwholesome, and that the defendant below knew the animal to be diseased, and did not communicate that fact when he sold the beef to the plaintiff below.

In 3 Black. Com. 165, it is stated as a sound and elementary proposition, that in contracts for provisions, it is always implied that they are wholesome; and if they are not, case lies to recover damages for the deceit.

In the sale of provisions for domestic use, the vendor is bound to know that they are sound and wholesome, at his peril. This

is a principle, not only salutary, but necessary to the preservation of health and life.

In the present case, the concealment of the fact that the animal was diseased, is equivalent to the suggestion of a falsehood that she was sound.

Judgment affirmed.

MOSES ET AL. v. MEAD ET AL.[1]

(1 Denio, 378.—1845.)

ERROR to the Superior Court of the city of New York. The plaintiffs in error sued the defendants in error in the court below, and declared in assumpsit upon a warranty on the sale of 194 bar-

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[1] In *Hargous* v. *Stone*, 5 N. Y. 73, 85–86, Paige, J., says: "The sale of provisions for domestic use is not an exception to the general rule of *caveat emptor*. The remedy of the purchaser, where the provisions turn out to be unwholesome, is given on the ground of the knowledge of the unsoundness by the seller, which the law presumes, and not on an implied warranty that the provisions are wholesome. (*Moses* v. *Mead*, 1 Denio, 378; *Van Bracklin* v. *Fonda*, 12 John. 468; *Emerson* v. *Brigham*, 10 Mass. 197, 202; 3 Black. Com. 165.) Where provisions are sold as merchandise, and not for immediate consumption by the purchaser, there is no implied warranty of soundness. (1 Denio, 378; 10 Mass. 197.)"

In *Hoe* v. *Sanborn*, 21 N. Y. 552, 560–561, Selden, J., in speaking of exceptions to the common law rule of *caveat emptor*, says: "One of these exceptions, which has been generally recognized, is, that upon the sale of provisions, which are purchased, not for the purpose of resale, but to be consumed by the purchaser, there is an implied warranty that such provisions are sound and wholesome. There are two cases in our own courts which show the foundation of this exception. The first is that of *Van Bracklin* v. *Fonda*, 12 John. 468, which was an action to recover damages for selling a quantity of beef as 'good and sound,' which proved 'bad and unwholesome.' There was in that case some evidence that the defendant knew the animal to be diseased before it was slaughtered; but the court, in giving judgment, say that 'in the sale of provisions for domestic use, the vendor is *bound* to know that they are sound and wholesome, at his peril.' Although what the court here says is that the vendor is bound to know the condition of what he sells, yet the subsequent case of *Moses* v. *Mead*, 1 Denio, 378, which was more elaborately considered, shows clearly that the doctrine rests upon a presumption of knowledge on his part. . . . The implied warranty depends, therefore, in these cases, as in all others, upon the question whether there is reason to impute to the vendor a knowledge of the defects, if any exist."

rels of mess beef, that the same was good, sound, merchantable and wholesome mess beef; whereas the same was unsound, sour, tainted, etc. On the trial the jury found a special verdict as follows: On the 9th of August, 1843, the plaintiffs, being merchants and dealers in provisions in the city of New York, bought of the defendants, who were wholesale grocers and provision merchants in the same city, 194 barrels of mess beef, and paid eight dollars per barrel, that being the market price for good, sound, wholesome mess beef. The beef had been inspected by a New York inspector in June previous, and branded "mess beef," and the inspector's bill was shown to the plaintiffs at the time of the sale. The plaintiffs examined one barrel of the beef, and might have examined more if they had chosen to do so. The beef was delivered on the day of the sale, and the purchase price was paid the next day. Neither of the parties knew that the beef was unsound. There was no express warranty by the defendants; nor was there any express agreement by the plaintiffs to take the risk of soundness; but the beef was bought and sold at the price of, and believing it to be, good, sound, sweet and wholesome mess beef. Beef is an article of provision used only for food for mankind. This beef was bought by the plaintiffs as provision merchants—not for the consumption of their own families—but to be sold to their customers in the usual course of their business. The beef was in fact unsound, sour, tainted, and unwholesome as food for mankind; by reason whereof the plaintiffs sustained damages to $400. The jury then referred it to the court to say whether they were authorized to imply or find a warranty, etc. Upon this special verdict the court below gave judgment for the defendants; and the plaintiffs now bring error.

By the Court, BRONSON, Ch. J. When there is neither fraud nor express warranty on the sale of a chattel, the buyer takes the risk of its quality and condition. No warranty of any kind can be implied from the fact that a sound price was paid. *Caveat emptor*, and not *caveat venditor*, is the rule of the common law; and that is our law. I speak of an executed, and not of an executory contract for the sale of goods. (See *Howard* v. *Hoey*, 23 Wend. 350.) Some of the English judges have lately shown a strong tendency towards the doctrines of the civil law in relation to sales, and have been disposed to im-

ply warranties where none were actually made. This is the more remarkable for the reason that the common law judges at Westminster Hall have not heretofore been disposed to think very highly of the civil law, except where it coincided with their own; and it has been thought a strong trait of British character, that nothing in the institutions of other countries is esteemed of much value, unless it be also common to the laws and customs of England. I do not regret to find that there are men in Great Britain who can look beyond the shores of that island: but I feel no disposition to follow them in their new zeal for the civil law; for the reason that it is not our law, and the further reason, that our law in relation to sales is the best. The civil law implies a warranty where none was in fact made. The common law leaves men to make their own bargains. If the purchaser wants an undertaking that the goods are sound or merchantable, he asks for it; and then the vendor decides for himself whether he will make such a contract, or let it alone. Under the civil law it is not enough for the seller's protection that he deals honestly, and does not warrant the goods; but he must make an agreement that no agreement shall be implied against him. When charged with a warranty, he cannot safely answer, prove it; nor will it be enough for him to show that no warranty was in fact made: he must go further, and prove an agreement to be exempt from the consequences of a contract which he did not make.

The last attempt with us to substitute the civil, for the common law rule, was made in relation to a sale of flour, which proved to be bad. The attempt failed, both in this court and the court of errors. (*Hart* v. *Wright*, 17 Wend. 267, and 18 id. 449.) We have made one inroad upon the common law rule, and allowed a warranty to be implied on a sale by sample, that the bulk of the article corresponds in quality with the sample exhibited. (*Waring* v. *Mason*, 18 Wend. 425.) This exception to the general rule, although now firmly established, stands upon no principle. If the purchaser wants such a warranty, he should ask for it; and then the vendor will have the opportunity of saying whether he will consent to make such a contract or not. The law now makes it for him without his consent: and he can only get rid of that result by taking the precaution to agree at the time of the sale, that no contract which he does not make shall afterwards be implied against him. It would,

I think, have been better had the maxim of *caveat emptor* been left unbroken.

We are referred to the authority of Blackstone for another exception to the general rule, and it is insisted that on a sale of *provisions*, there is an implied warranty that they are wholesome. (3 Black. Com. 164–5.) The language of the commentator leaves it somewhat doubtful whether his mind was not upon a *deceit* in the sale, which stands on a different footing from a warranty. If he intended to affirm that the law always implies a warranty of soundness on the sale of provisions, the remark is without any support in the English adjudications. There is a *dictum* of Tanfield, C. B., and Altham, Baron, in *Roswel* v. *Vaughan*, Cro. Jac. 196, that "if a man sell victuals which is corrupt, without warranty, an action lies, because it is against the commonwealth." But they were evidently speaking of a sale of food for man's use, knowing it to be unwholesome, which is an indictable offense. The dictum of Blackstone has been directly overruled in Massachusetts. (*Emerson* v. *Brigham*, 10 Mass. R. 197.) The case of *Bailey* v. *Nichols*, 2 Root, 407, was not put upon the ground that it was a sale of provisions: and besides, the case has been overruled. (*Dean* v. *Mason*, 4 Conn. R. 428.) The doctrine of Blackstone, with a very important qualification, was approved by the judge who prepared the opinion in *Van Bracklin* v. *Fonda*, 12 John. 468, but that was plainly a case of fraud. The jury found that the beef was unsound and unwholesome, and that the defendant—the seller—*knew* the animal to be diseased. The case of *Hart* v. *Wright*, 17 Wend. 267, and 18 id. 449, arose on a sale of provisions; and one member of the court of errors was for implying a warranty of soundness; but that opinion did not prevail. The only distinction which was mentioned at the bar between that case and the one now before us, is, that flour is sometimes applied to other uses, while the jury have found that this beef was an article of provisions used only as food for mankind. The distinction is not broad enough for the foundation of a judicial decision. Although flour is sometimes applied to other purposes, it is most generally used as an article of food.

Although the doctrine of Blackstone cannot be supported in its whole extent, I am not disposed to deny, that on a sale of provisions for immediate consumption, the vendor may be held responsible, in some form, for the sound and wholesome condi-

tion of the articles which he sells. It is not, perhaps, too much to presume that butchers, grocers, and others who furnish by retail the usual supplies for the families of customers, are, from the nature of their employment, acquainted with the quality of the articles in which they deal. In *Van Bracklin* v. *Fonda*, 12 John. 468, it was said that "in the sale of provisions for domestic use, the vendor is bound to know that they are sound and wholesome, at his peril. This is a principle, not only salutary, but necessary to the preservation of health and life." I find no difficulty in subscribing to that doctrine. But there is a very plain distinction between selling provisions "for domestic use," and selling them as articles of merchandize, which the buyer does not intend to consume, but to sell again. Such sales are usually made in large quantities, and with less opportunity to know the actual condition of the goods than when they are sold by retail. When provisions are not sold for immediate consumption, there is no more reason for implying a warranty of soundness, than there is in relation to sales of other articles of merchandize. We are of opinion that the maxim of *caveat emptor* was properly applied to this case by the court below; and as there was neither fraud nor express warranty, the action cannot be maintained.

Judgment affirmed.

DIVINE v. MCCORMICK.[1]

(50 Barbour, 116.—1867.)

PLAINTIFF alleged that defendant wrongfully and wilfully sold him a heifer, to be killed and used for beef, and that plain-

[1] In *Fairbanks Canning Co.* v. *Metzger*, 118 N. Y. 260, Parker, J., says: "It is not necessary for the disposition of this case to decide and, therefore, it is not decided, whether a warranty is implied in all cases of a sale of fresh dressed meat, by the party slaughtering the animals, that they were not heated before being killed, and, as some of my associates are averse to any expression whatever upon that question at this time, what is said must be regarded as an individual view rather than that of the court. My attention has not been called to a decision in this state covering that precise question.

"It was determined in *Divine* v. *McCormick*, 50 Barb. 116, that in the sale

tiff paid therefor the sum of $14.33; that at the time of the sale said heifer was diseased and unfit to kill for beef; that the disease was not visible externally. There was no evidence of any express warranty, but there was evidence tending to show that defendant knew the diseased condition of said heifer.

The jury in the justice's court found for defendant, which was reversed on appeal to the county court. Defendant now appeals.

By the Court, HOGEBOOM, J. I do not share in the apprehension expressed by Justice Bronson in *Moses* v. *Mead*, 1 Denio, 386, lest a new inroad should be made upon the doctrine of "*caveat emptor*," by implying a warranty of soundness on the sale of provisions; nor concur in the statement made by him in the same case, (p. 388,) that "where provisions are not sold for immediate consumption, there is no more reason for implying a warranty of soundness than there is in relation to sales of other articles of merchandize." On the contrary, I am of opinion that sound policy and a proper regard to the public health would dictate an enlargement of the exception to the general rule, rather than otherwise. But we must take the law as it is, which in this state is fairly expressed in the leading case of *Van Bracklin* v. *Fonda*, 12 John. 468, as follows: "In

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of a heifer for immediate consumption, a warranty that she is not diseased and unfit for food is implied. That decision is well founded in principle, and is in accordance with a sound public policy, which demands that the doctrine of '*caveat emptor*' shall be still further encroached upon, rather than that the public health shall be endangered. I see no reason for applying the rule to one who slaughters and sells to his customers for immediate consumption, and denying its application to one who slaughters and sells to another to be retailed by him. In each case it is fresh meat intended for immediate consumption.

"The rule is well settled by the courts of last resort in many of the states that a vendor of an article manufactured by him for a particular use, impliedly warrants it against all such defects as arise from his unskillfulness either in selecting the materials or in putting them together and adapting them to the required purpose. (See cases cited in Albany Law Journal, vol. 18, page 324.)

"One who prepares meat for the wholesale market may be said to come within that rule. Because he purchases the cattle; determines whether they are healthy and in proper condition for food; and upon his skill in dressing and preparing the meat for transportation a long distance, its quality and condition as an article of diet for the consumer largely depends."

the sale of provisions for domestic use, the vendor is bound to know that they are sound and wholesome, at his peril. This is a principle not only salutary but necessary to the preservation of health and life." Judge Bronson, in the case before cited, (1 Denio, 387,) expresses the substance of the doctrine in this form: "Although the doctrine of Blackstone, (that on a sale of provisions there is an implied warranty that they are wholesome, 3 Black. Com. 164, 165,) cannot be supported in its whole extent, I am not disposed to deny that on a sale of provisions for *immediate consumption* the vendor may be held responsible in some form for the sound and wholesome condition of the articles which he sells." Assuming such to be the law of this state, to wit, that to render the vendor liable on an implied warranty in the sale of provisions they must be sold for domestic use, or immediate consumption, I am nevertheless of opinion that the judgment should be affirmed.

1. The fair inference is, from the undisputed evidence, (not contradicted by the defendant, who was sworn as a witness,) that the heifer in question, (whose diseased and unfit condition for food is not denied,) was sold for immediate consumption. The plaintiff's testimony is that he bought the heifer, two or three years old, *for beef*, and told the defendant he was going to kill it the *next day*, which he did. It nowhere appears that the plaintiff was a butcher, or was buying to sell again; and I think we ought not—especially in a case of this kind—to *infer* that such was the fact. If I am right in this position, it follows that the judgment should be affirmed.

2. It is a fair, (and almost irresistible,) inference from the testimony of Stewart, Cochran, Leach, and the defendant, that the defendant was aware of, or had great reason to suspect, the unsound and unwholesome condition of the heifer, when he sold her to the plaintiff. If so he was bound to disclose it. Although there may be some question whether this last testimony was admissible under the pleadings, yet being received without objection and considered, it may be referred to to uphold the judgment of the county court, which I think rightfully reversed the judgment of the justice, founded upon the remarkable verdict of the jury in favor of defendant. Under the facts developed in the case it is satisfactory to be able to pronounce in favor of the *affirmance* of the judgment of the county court.

Burch et al. v. Spencer et al.

(15 Hun, 504.—1878.)

Tappan, J. This action originated in a Justice's Court, in Broome county, where the defendants had a verdict and judgment in their favor. The plaintiffs appealed from such judgment to the Broome County Court for a new trial, where a trial was had before a jury, and judgment of nonsuit entered, with costs. Plaintiffs then moved such court for a new trial, which motion was denied; from such order plaintiffs appeal to this court. The order is appealable as affecting a substantial right, and the appeal brings up the question whether, upon the case made on the trial, the nonsuit ought to have been granted. (4 Wait's Pr. 342.)

The complaint alleges that the plaintiffs were copartners at Marathon, N. Y., under the firm-name of Burch, Burgess & Co., doing business there in buying and packing meat and pork for shipment and sale at New York and other markets for food, the defendants well knowing such fact; that the defendants offered to deliver to the plaintiffs, for the purpose aforesaid, the meat of one hog, and to induce the plaintiffs to purchase the same, *warranted* and falsely and fraudulently represented to the plaintiffs that the said meat or pork of said hog was of good, merchantable quality, fit and proper for food and for packing for such markets and such use; that in consequence of such representations plaintiffs purchased the meat of such hog, and paid therefor the sum of $26.60; that such meat, at the time of said sale, was not good and of merchantable quality, and was not fit and proper for food, nor for packing for such markets, but was of bad, unsalable and unmerchantable quality, and was not fit or proper for food, or for packing and shipping in the markets before mentioned, nor in any market for food; that the same was stale, strong, unsavory, disgusting, unpalatable meat or pork; that the same was *boar* meat, and tainted with the unsavory quality, taste and smell of the same, rendering it unfit for food, or for packing for food, as defendants at the time of the sale well knew; that said meat or pork, if of the kind and quality warranted and represented, would have been of the value of $45.00, but in fact was of no value to plain-

tiffs; that by reason of the sale, plaintiffs bestowed care, attention, labor and material upon such meat or pork of the value of $15.00, which was lost. Defendants answered, denying the complaint.

It appeared upon the trial in the County Court, that plaintiffs, in November, 1871, were partners at Marathon, Cortland county; that their business was buying and packing pork, mostly for home consumption; that they sold not only at wholesale, but at retail; that portions of the meat packed by them was sold to their immediate neighbors for food; that the loins and spare-ribs were sold to their neighbors for fresh meat, and so used by them; plaintiffs smoked the hams, and retailed what they could in the neighborhood, and wholesaled the rest; plaintiffs also used from the fresh pork themselves; that the pork bought by plaintiffs was for food for mankind, and for no other purpose, and there was evidence tending to prove that the defendants knew it.

It also appeared that one Jabez Johnson, an agent of plaintiffs, at Whitney's Point, purchased the hog in question for them, in November, 1871. The price paid was five cents per pound—the highest price paid that season for pork to use as food. On the day of the sale, and before the purchase, defendants claimed to Johnson that they were going to send the hog to New York with a box of poultry; and the same day after the hog had been bargained for, but before weighed, delivered, or paid for, one of the defendants, in the presence of the other and of Johnson, when one Rogers suggested that the pork was that of an old boar hog, denied the fact. Immediately after, the hog was delivered and paid for. . . .

The meat of a boar hog is unfit for food for man; it had never been worth more than one cent per pound, and that for grease or lard oil only. Defendants knew the quality of this class of meat, and the use to which it could be put, and before plaintiffs' agent applied to purchase the pork in question had intended to dispose of it for such purpose. It also appeared that a person, although acquainted with boars, might be deceived; they were sometimes bought by experienced men without knowing it. Plaintiffs' agent bought the hog for merchantable pork for food. Upon trial the meat of the hog purchased could not be used, and immediate notice was given to defendants.

The County Court held that the plaintiffs could not maintain this action on the ground of fraud in the seller, because the action is based upon a contract, and not upon fraud; that there was no evidence in the case of an express warranty made by the defendants to the plaintiffs respecting the quality of the hog in question. Plaintiffs asked to amend their complaint and set up a charge of fraudulent concealment, in connection with the complaint as it stood. The motion was denied. Plaintiffs then asked to go to the jury upon the question of fraud in the complaint as it stood. The court denied the request. The plaintiffs then asked to submit to the jury the question whether there was sufficient evidence for them to find an implied warranty, and claimed that there was sufficient evidence that defendants knew, at the time of the sale, that the hog was purchased for food for man. The court denied the request, and granted defendants' motion for a nonsuit, to each of which rulings plaintiffs duly excepted.

We think the County Court was right in holding that the complaint is for a warranty, and not upon fraud, and in denying the plaintiffs' motion to amend it in such manner as to change the character of the action from contract to tort. At the last May term of this court it was held that the County Court, in a case where a new trial was had on appeal from Justice's Court, could not allow an answer interposed in Justice's Court, consisting of a general denial, to be amended by inserting therein new and affirmative defenses, such as payment, set-off, or counterclaim; that no amendments should be allowed which would entirely change the issues in the court below, but only such as would enable the parties to try such issues. (*Reno* v. *Millspaugh*, 21 N. Y. S. C. R. 229.) The complaint is sufficient to sustain an action upon an implied warranty. The general averment therein that the defendants warranted the article sold is sufficient; under such averment, an implied or express warranty could be proven. (*Hoe* v. *Sanborn*, 21 N. Y. opinion, 555.) The contract was executed, and there was no express warranty. In such a case, no warranty of any kind can be implied from the fact that a sound price was paid, as was said in *Moses* v. *Mead*, 1 Denio, 378; *S. C.* affirmed in Court of Errors, 5 Denio, 617. *Caveat emptor*, and not *caveat venditor*, is the rule of the common law, and that is our law.

In that case, in August, the plaintiffs, being merchants and

dealers in provisions in the city of New York, bought of the defendants, who were wholesale grocers and provision merchants in the same city, 194 barrels of mess beef, and paid therefor the regular market price for good, sound, wholesome mess beef. The beef had been inspected by a New York inspector in June before, and branded "mess beef," and the inspector's bill was shown to the plaintiffs at the time of the sale. The plaintiffs examined one barrel of the beef, and might have examined more, had they chosen to do so. The beef was delivered on the day of the sale, and the purchase-price paid the next day. There was no express warranty by the defendants, nor was there any express agreement by the plaintiffs to take the risk of soundness, but the beef was bought and sold at the price of, and believing it to be, good, sound, sweet and wholesome mess beef. It was bought by the plaintiffs as provision merchants, not for consumption in their own families, but to be sold to their customers, in the usual course of their business. The beef was, in fact, unsound, sour, tainted and unwholesome as food for mankind, by reason whereof plaintiffs sustained damages. In that case, it was held that the beef was sold as merchandize, and that there was *no implied warranty of soundness.*

In giving the reasons for the decision, the court state that, on a sale of provisions for immediate consumption, the vendor may be held responsible, in some form, for the sound and wholesome condition of the articles which he sells; that it is not, perhaps, too much to presume that butchers, grocers and others, who furnish by retail the usual supplies for the families of customers, are, from the nature of their employment, *acquainted with the quality of the articles in which they deal;* but there is a very plain distinction between selling provisions for domestic use and selling them as articles of merchandise, which the buyer does not intend to consume, but to sell again. Such sales are made in large quantities, and *with less opportunity to know the actual condition of the goods than when they are sold by retail.* This judgment was affirmed in the Court of Errors by an equally divided court.

It was said by Selden, J., in *Hoe* v. *Sanborn*, 21 N. Y. opinion, 555: "It is a universal doctrine, founded on the plainest principles of natural justice, that whenever the article sold has some latent defect, which is known to the seller, but not to the purchaser, the former is liable for this defect, if he fails to dis-

close his knowledge on the subject at the time of the sale. In all such cases, where the knowledge of the vendor is proved by direct evidence, his responsibility rests upon the ground of fraud. But there are cases in which the probability of knowledge on the part of the vendor is so strong, that the courts will presume its existence without proof; and, in these cases, the vendor is held responsible upon an *implied warranty*."

In *Van Bracklin* v. *Fonda*, 12 J. R. 468, it was held that the sale of a quarter of beef from an animal slaughtered for fear she would die, concealing the fact that the animal was diseased, was equivalent to the suggestion of a falsehood that she was sound.

In *Divine* v. *McCormick*, 50 Barb. S. C. R. 116, plaintiff bought a heifer of defendant, which he told defendant he was going to kill the next day. The heifer when butchered was found to be diseased; the disease was not visible externally. There was evidence given tending to show that the defendant knew, or had reason to suspect the diseased condition of the heifer at the time of the sale. The jury in Justice's Court rendered a verdict for the defendant; the County Court reversed the judgment, and the judgment of the latter court was affirmed by the General Term of this court. In the *People* v. *Parker*, 38 N. Y. 85, upon an indictment for selling unwholesome beef knowing it to be such, the defendants' counsel requested the court to charge the jury, that if they should find that the beef was purchased as an article of merchandize, and not for consumption, then the indictment could not be sustained. The judge refused to so charge, and the jury found the defendant guilty; the Court of Appeals held the conviction proper and affirmed it.

Clerk, J., who delivered the opinion of the court in the case, says, at page 87: "I do not see why a man who knowingly sells unwholesome and diseased beef for human food, should be absolved from guilt because he was not informed of the particular individuals who were to suffer from the use of it." In the case at bar, as has already appeared in the statement of facts proven, the defendants knew that the pork offered for sale to the plaintiffs' agent was the pork of a boar; that such meat was unwholesome and unfit for food for man. They also knew from the price the plaintiffs paid for the pork, and the fact that Rodgers proposed to buy some of the meat for food, that the

same was intended for food for man, and not to be manufactured into grease or lard oil, the only use it could have been properly put to. They concealed and denied the fact that the animal which they were so selling was a boar. The circumstances of the case are such that the law implies a warranty on the part of the vendor, that the meat offered for sale was not that of a boar, and was of a character fit and suitable for food for man. (3 Blackstone [Cooley's ed.], 165.) I believe that this view of the case is in strict accordance with public policy, which requires that only articles that are sound, wholesome and fit for use, shall be knowingly sold for food, and that in accordance with such policy the law implies a warranty in all cases of an executed contract of sale of articles of food, that the same are sound, wholesome, and fit for use as such; where the vendor has *personal knowledge of the quality and condition of the articles sold, not known to the purchaser, and that the party purchasing intends to use the articles for food, or to sell them to others to be used for the same purpose.*

Judgment should be reversed and new trial ordered in the County Court, costs to abide the event.

Present—LEARNED, P. J., BOARDMAN and TAPPAN, JJ.

Ordered accordingly.

GIROUX v. STEDMAN ET AL. (THREE CASES).

(145 Massachusetts, 439.—1888.)

TORT. Action to recover damages for selling to plaintiffs pork unfit for food. No representations were made as to the quality of pork at the time of the several sales.

Verdict for defendants; plaintiffs allege exceptions.

DEVENS, J. It was known to the defendants that the plaintiffs purchased the meat to be used as provisions, but it was held by the presiding judge that, in order that they should recover, they must prove the allegations in their declarations, that the defendants knew that the meat sold by them was unwholesome, and improper to be used as provisions. He instructed the jury that, at common law, the general rule is, that

where personal property is sold in the presence of buyer and seller, each having an opportunity to see the property, and there is nothing said as to the quality, the only implied warranty on the part of the seller is that he has a valid title in, or has a right to sell, the chattel. He added, that there is an exception to this general rule where a provision dealer or market-man sells provisions, as meat and vegetables, to his customers for use, and that in such case there would be an implied warranty that they were fit for use and wholesome.

Whether this exception exists or not, it is not important in the case at bar to inquire, as it cannot be, and was not, contended that even if the rule is well established that, where there is no express warranty and no fraud, no warranty of the quality of the thing sold is implied by law, and that the maxim of *caveat emptor* applies, there is a more general exception which excludes from its operation all sales of provisions for immediate domestic use, no matter by whom made.

That in a sale of an animal by one dealer to another, even with the knowledge that the latter dealer intends to convert it into meat for domestic use, or that in the sale of provisions in the course of commercial transactions there is no implied warranty of the quality, appears to be well settled. (*Howard* v. *Emerson*, 110 Mass. 320, and cases cited; *Burnby* v. *Bollett*, 16 M. & W. 644.) While occasional expressions may be found, as in *Van Bracklin* v. *Fonda*, 12 Johns. 468, which sustain the plaintiffs' contention, we have found but one decided case which supports it. In *Van Bracklin* v. *Fonda*, *ubi supra*, it is said that in a sale of provisions the vendor is bound to know that they are sound, at his peril, but the case shows that the defendant, who had sold beef for domestic use, knew the animal from which it came to be diseased. This had been found by the jury, and the remark is made in connection with the facts proved. The case of *Hoover* v. *Peters*, 18 Mich. 51, does sustain the plaintiffs' contention, as it is there held that, where articles of food are bought for domestic consumption, and the vendor sells them for that express purpose, the law implies a warranty that they are fit for such purpose, whether the sale be made by a retail dealer or by any other person. This case imposes a heavier liability on a person not engaged in the sale of provisions as a business than he should be called on to bear. The opinion is not supported by any citation of authorities. In

a dissenting opinion by Mr. Justice Christiancy it is said: "Had it appeared that he [the defendant] was the keeper of a meat market or butcher's shop and was engaged in the business of selling meat for food, and therefore bound or presumed to know whether it was fit for that purpose, I should have concurred in the opinion my brethren have expressed." If there is an exception to the rule of *caveat emptor* which grows out of the circumstances of the case and the relations of buyer and seller, where the latter is a general dealer and the former a purchaser for immediate use, there appears no reason why it should be further extended.

In the case at bar, the defendants were not common dealers in provisions, or marketmen. They were farmers selling a portion of the produce of their farms. No representations of the quality of the meat sold [were] made by them. In making casual sales from a farm of its products, to hold the owner to the duty of ascertaining at his peril the condition of the articles sold, and of impliedly warranting, if sold with the knowledge that they are to be used as food, that they are fit for the purpose, imposes a larger liability than should be placed upon one who may often have no better means of knowledge than the purchaser.

The plaintiffs contend that the case of *French* v. *Vining*, 102 Mass. 132, is decisive in their favor, but it appears to us otherwise. In that case the defendant sold hay, which he knew had been poisoned, for the purpose of being fed to a cow, although he had carefully endeavored to separate the damaged portion from the rest, and supposed he had succeeded. From the effects of eating the hay the cow died, and the defendant was held liable. His knowledge of the injury to the hay was certain and positive; his belief that he had remedied the difficulty was conjectural and uncertain, and proved to be wholly erroneous.

In the case at bar, while the defendants' herd had been exposed to hog cholera, there was evidence that a portion of it only had been affected, and further, that, even if affected, the meat of the animals was not necessarily unwholesome. There was no evidence that the animals whose meat was sold had ever, so far as the defendants knew, actually had the disease; and the verdict of the jury has established that they were ignorant that the meat sold by them was unwholesome.

In *French* v. *Vining*, the defendant knew what the condition of the hay had been, and this is a vital part of the case. He sold an article which he knew had been poisoned, and from which he had taken no effectual means to remove the poison. His belief or supposition that his effort had been successful could not relieve him from liability for the consequences that ensued because it had been unsuccessful, if he sold the hay without informing the purchaser of the dangerous injury which it had received.

Exceptions overruled.

FIELDER v. STARKIN.

(1 Henry Blackstone, 17.—1788.)

THIS was an action on the warranty of a mare, "*that she was sound, quiet, and free from vice and blemish.*" Plea, *non-assumpsit*, on which issue was joined.

It appeared on the trial that the plaintiff had bought the mare in question of the defendant in March, 1787, for 30 guineas, and that the defendant *warranted her sound, and free from vice and blemish.* Soon after the sale, the plaintiff discovered that she was unsound and vicious, but kept her three months after this discovery, during which time he gave her physic and used other means to cure her. At the end of the three months he sold her, but she was soon returned to him as unsound. After she was so returned, plaintiff kept her till October, 1787, and then sent her back to the defendants as unsound, who refused to receive her. On her way back to the plaintiff's stable, the mare died, and on her being opened, it was the opinion of the farriers who examined her, that she had been unsound *a full twelve-month before her death.* It also appeared that the plaintiff and defendant had been often in company together during the interval between the month of *March*, when the mare was sold to the plaintiff, and October, when he sent her back to the defendant; but it did not appear that the plaintiff had ever in that time acquainted the defendant with the circumstance of her being unsound. The jury found a verdict for the plaintiff with 30 guineas damages.

LORD LOUGHBOROUGH. Where there is an express warranty the warrantor undertakes that it is true at the time of making it. If a horse which is warranted sound at the time of sale, be proved to have been *at that time unsound*, it is not necessary that he should be *returned to the seller*. No length of time elapsed after the sale, will alter the nature of a contract originally false. Neither is notice necessary to be given. Though the not giving notice will be a strong presumption against the buyer, that the horse at the time of the sale had not the defect complained of, and will make the proof on his part much more difficult. The bargain is complete, and if it be fraudulent on the part of the seller, he will be liable to the buyer in damages, *without either a return or notice*. If on account of a horse warranted sound, the buyer should sell him again at a loss, an action might perhaps be maintained against the originar seller, to recover the difference of the price.[1] In the present case it appears from the evidence of the farriers who saw the mare opened that she must have been unsound *at the time of the sale to the plaintiff*.

HEATH, J. If this had been an action for money had and received to the plaintiff's use, an immediate return of the mare would have been necessary; but as it is brought on the express warranty, there was no necessity for a return to make the defendant liable.

Rule discharged.[2]

(Concurring opinions by GOULD and WILSON, JJ., omitted.)

STREET v. BLAY.

(2 Barnewall & Adolphus, 456.—1831.)

LORD TENTERDEN, C. J., delivered the judgment of the Court. The facts of the case were these:—The plaintiff, on the 2d of February, sold the horse to the defendant for 43 l., with a warranty of soundness. The defendant took the horse, and on

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[1] S. P. per Mansfield, C. J., in *Caswell* v. *Coare*, 1 Taunt. 568.

[2] See Term Rep. B. R. vol. 1. p. 136. Dr. Compton's case, there cited.

the same day sold it to Bailey for 45 l. Bailey, on the following day, parted with it in exchange to Osborne; and Osborne, in two or three days afterwards, sold it to the defendant for 30 l. No warranty appeared to have been given on any of the three last sales. The horse was, in fact, unsound at the time of the first sale; and on the 9th of February the defendant offered to return it to the plaintiff, who refused to accept it. [The horse, when returned, was lame. The trial judge instructed the jury, if they were of opinion that the horse was sound at the time of the first sale, to find for the plaintiff, otherwise for the defendant, reserving for the opinion of this court the question whether or not the defendant, after having sold the horse could, upon becoming possessed of him again, return him to the plaintiff, and refuse payment of the price by reason of the original unsoundness. The jury found for the defendant. A rule was then obtained to show cause why the verdict should not be set aside and a verdict entered for the plaintiff for 43 l.] The question for consideration is, whether the defendant, under these circumstances, had a right to return the horse, and thereby exonerate himself from the payment of the whole price.

It is not necessary to decide, whether in any case the purchaser of a *specific chattel*, who, having had an opportunity of exercising his judgment upon it, has bought it, with a warranty that it is of any particular quality or description, and *actually accepted and received* it into his possession, can afterwards, upon discovering that the warranty has not been complied with, of his own will only, without the concurrence of the other contracting party, return the chattel to the vendor, and exonerate himself from the payment of the price, on the ground that he has never received that article which he stipulated to purchase. There is, indeed, authority for that position. Lord Eldon, in the case of *Curtis* v. *Hannay*, 3 Esp. N. P. C. 83, is reported to have said, that "he took it to be clear law, that if a person purchases a horse which is warranted sound, and it afterwards turns out that the horse was unsound at the time of the warranty, the buyer might, if he pleased, keep the horse and bring an action on the warranty, in which he would have a right to recover the difference between the value of a sound horse and one with such defects as existed at the time of the warranty; or he might *return the horse and bring an action to recover the full money paid;* but in the latter case, the seller had a right to

expect that the horse should be returned in the same state he was when sold, and not by any means diminished in value;" and he proceeds to say, that if it were in a worse state than it would have been if returned immediately after the discovery, the purchaser would have no defense to an action for the price of the article. It is to be implied that he would have a defense in case it were returned in the same state, and in a reasonable time after the discovery. This dictum has been adopted in Mr. Starkie's excellent work on the Law of Evidence, part IV., p. 645; and it is there said that a vendee may, in such a case, rescind the contract altogether by returning the article, and refuse to pay the price, or recover it back if paid. It is, however, extremely difficult, indeed impossible, to reconcile this doctrine with those cases in which it has been held, that where the property in the specific chattel has passed to the vendee, and the price has been paid, he has no right, upon the breach of the warranty, to return the article and revest the property in the vendor, and recover the price as money paid on a consideration which has failed, but must sue upon the warranty, unless there has been a condition in the contract authorizing the return, or the vendor has received back the chattel, and has thereby consented to rescind the contract, or has been guilty of a fraud, which destroys the contract altogether. *Weston* v. *Downes*, 1 Doug. 23, *Towers* v. *Barrett*, 1 T. R. 133, *Payne* v. *Whale*, 7 East, 274, *Power* v. *Wells*, Doug. 24 *n.*, and *Emanuel* v. *Dane*, 3 Campb. 299, where the same doctrine was applied to an exchange with a warranty, as to a sale, and the vendee held not to be entitled to sue in trover for the chattel delivered, by way of barter, for another received. If these cases are rightly decided, and we think they are, and they certainly have been always acted upon, it is clear that the purchaser cannot by his own act alone, unless in the excepted cases above mentioned, revest the property in the seller, and recover the price when paid, on the ground of the total failure of consideration; and it seems to follow that he cannot, by the same means, protect himself from the payment of the price on the same ground. On the other hand, the cases have established, that the breach of the warranty may be given in evidence in mitigation of damages, on the principle, as it should seem, of avoiding circuity of action, *Cormack* v. *Gillis*, cited 7 East, 480, *King* v. *Boston*, 7 East, 481 *n.*; and there is no hardship in such a defence being

allowed, as the plaintiff ought to be prepared to prove a compliance with his warranty, which is part of the consideration for the specific price agreed by the defendant to be paid.

It is to be observed, that although the vendee of a specific chattel, delivered with a warranty, may not have a right to return it, the same reason does not apply to cases of executory contracts, where an article, for instance, is ordered from a manufacturer, who contracts that it shall be of a certain quality, or fit for a certain purpose, and the article sent as such is never completely accepted by the party ordering it. In this and similar cases the latter may return it as soon as he discover the defect, provided he has done nothing more in the mean time than was necessary to give it a fair trial, *Okell* v. *Smith*, 1 Stark. N. P. C. 107; nor would the purchaser of a commodity, to be afterwards delivered according to sample, be bound to receive the bulk, which may not agree with it; nor after having received what was tendered and delivered as being in accordance with the sample, will he be precluded by the simple receipt from returning the article within a reasonable time for the purpose of examination and comparison. The observations above stated are intended to apply to the purchase of a certain *specific chattel*, accepted and received by the vendee, and the property in which is completely and entirely vested in him.

But whatever may be the right of the purchaser to return such a warranted article in an ordinary case, there is no authority to show that he may return it where the purchaser has done more than was consistent with the purpose of trial; where he has exercised the dominion of an owner over it, by selling and parting with the property to another, and where he has derived a pecuniary benefit from it. These circumstances concur in the present case; and even supposing it might have been competent for the defendant to return this horse, after having accepted it, and taken it into his possession, if he had never parted with it to another, it appears to us that he cannot do so after the re-sale at a profit.

These are acts of ownership wholly inconsistent with the purpose of trial, and which are conclusive against the defendant, that the particular chattel was his own; and it may be added, that the parties cannot be placed in the same situation by the return of it, as if the contract had not been made, for the defendant has derived an intermediate benefit in consequence of the

bargain, which he would still retain. But he is entitled to reduce the damages, as he has a right of action against the plaintiff for the breach of warranty. The damages to be recovered in the present action have not been properly ascertained by the jury, and there must be a new trial, unless the parties can agree to reduce the sum for which the verdict is to be entered; and if they do agree, the verdict is to be entered for that sum.

Rule absolute on the above terms.

FAIRBANK CANNING COMPANY v. METZGER ET AL.

(118 New York, 260.—1890.)

DEFENDANTS contracted to buy and plaintiff to sell a car load of dressed beef, to be delivered on board of a car at Chicago. The plaintiff agreed to furnish beef that had not been heated before being killed, that it should be chilled before it was loaded on the car, and be in first class and in merchantable condition. The meat was to be wholesaled from the car by defendants' agent from Dunkirk to Elmira, at which latter place whatever remained unsold was to be retailed.

In an action to recover the contract price, the defendants alleged a warranty and its breach by way of counterclaim. The referee, before whom the case was tried, found that the "defendants did all they could to dispose of it [the car load of beef], and save what they could from it, after the car had been opened several times on different days between Dunkirk and Elmira and finding they could not use it they shipped back to the plaintiff 12,991 pounds, and notified plaintiff by wire of the same, and plaintiff immediately wired back that they would not receive it, whereupon the defendants ordered the same back to Elmira," and found as matter of law that there was no warranty. Judgment, directed for the plaintiff, was affirmed by the General Term of the Supreme Court.

PARKER, J. In the absence of a warranty as to quality and a breach, the defendants' claim for damages could not have survived the use of the property. For in such case vendees are bound to rescind the contract and return, or offer to return,

the goods. If they omit to do so, they will be conclusively presumed to have acquiesced in their quality. (*Coplay Iron Company* v. *Pope*, 108 N. Y. 232.) Therefore, if the referee was right in holding that there was no warranty as to quality, collateral to the contract of sale, we need not inquire further, as the judgment must be affirmed. The referee has found the facts and this court may properly review his legal conclusion as to whether they amounted to a warranty.

"A warranty is an express or implied statement of something which a party undertakes shall be a part of a contract, and, though part of the contract, collateral to the express object of it." (2 Schouler on Personal Property, 327.) All contracts of sale with warranty, therefore, must contain two independent stipulations:

First. An agreement for the transfer of title and possession from the vendor to the vendee.

Second. A further agreement that the subject of the sale has certain qualities and conditions.

It is not necessary that in the collateral agreement the word warranty should be used. No particular phraseology is requisite to constitute a warranty. "It must be a representation which the vendee relies on and which is understood by the parties as an absolute assertion, and not the expression of an opinion." (*Oneida Manufacturing Society* v. *Lawrence*, 4 Cow. 440.) It is not necessary that the vendor should have intended the representation to constitute a warranty. If the writing contains that which amounts to a warranty the vendor will not be permitted to say that he did not intend what his language clearly and explicitly declares. (*Hawkins* v. *Pemberton*, 51 N. Y. 198.) In that case the defendants purchased at auction an article, relying upon the representation of the auctioneer that it was "blue vitriol." It was in fact "Salzburger vitriol," an article much less valuable. In an action brought against the purchaser the trial court directed a verdict for the plaintiff. This was held to be error because the representation at the sale amounted to a warranty.

Judge Earl in delivering the opinion of the court after collating and discussing the authorities upon the subject of warranty, said: "The more recent cases hold that a positive affirmation, understood and relied upon as such by the vendee, is an express warranty."

In *Kent* v. *Friedman*, 17 W'kly Dig. 484, Judge Learned in his opinion says: "There can be no difference between an executory contract to sell and deliver goods of such and such a quality and an executory contract to sell and deliver goods which the vendor warrants to be of such and such a quality. The former is as much a warranty as the latter." The Court of Appeals subsequently affirmed the judgment of the General Term without an opinion. (101 N. Y. 616.)

In *White* v. *Miller*, 71 N. Y. 118, frequently referred to as the "Bristol cabbage seed case," the Court says: "The case of *Hawkins* v. *Pemberton*, *supra*, adopts as the law in this state, the doctrine upon this subject now prevailing elsewhere, that a sale of a chattel by a particular description, is a warranty that the article sold is of the kind specified."

So, too, a sale by sample imports a warranty that the quality of the goods shall be equal in every respect to the sample. (*Briggs* v. *Hilton*, 99 N. Y. 517, and cases cited.)

Now, in the case before us, the defendants undertook to purchase of the plaintiff fresh dressed beef to be wholesaled in part and the residue retailed to their customers. They endeavored to procure good beef. Not only did they contract for beef that was clean, well-dressed, in first class condition in every respect, and merchantable, and that was thoroughly chilled before being loaded on the cars; but further, that they should not be given beef that had been heated before being killed.

When, therefore, the plaintiff placed in a suitable car beef well-dressed and clean, and of the general description given in defendants' order, it had made a delivery of the merchandise sold, and by the terms of the contract was entitled to be paid as soon as the bill should reach defendants and before the arrival of the beef made an examination by defendants possible.

But there was another collateral agreement, and yet forming a part of the contract which the plaintiff had not performed. An engagement of much consequence to the defendants and their customers, because it affected the quality of the meat. Upon its performance or non-performance depended whether it should be wholesome as an article of food. It was of such a character that defendants were obliged to rely solely upon the representation of the plaintiff in respect thereto. The plaintiff or its agents selected from their stock the cattle to be slaughtered. No one else knew or could know whether they

were heated and feverish. Inspection immediately after placing the beef in the car would not determine it. That collateral engagement consisted of a representation and agreement that plaintiff would deliver to the defendants beef from cattle that had not been heated before being slaughtered. Such representation and agreement amounted to an express warranty.

The referee found as a fact: "That the meat had been heated before being killed," therefore there was a breach of the warranty, and the defendants are entitled to recover their damages, by way of counter-claim, unless such right must be deemed to have been subsequently waived.

It is not necessary for the disposition of this case to decide and, therefore, it is not decided, whether a warranty is implied in all cases of a sale of fresh dressed meat, by the party slaughtering the animals, that they were not heated before being killed, and, as some of my associates are averse to any expression whatever upon that question at this time, what is said must be regarded as an individual view rather than that of the court. My attention has not been called to a decision in this state covering that precise question.

It was determined in *Divine* v. *McCormick*, 50 Barb. 116, that in the sale of a heifer for immediate consumption, a warranty that she is not diseased and unfit for food is implied. That decision is well founded in principle, and is in accordance with a sound public policy, which demands that the doctrine of "*caveat emptor*" shall be still further encroached upon, rather than that the public health shall be endangered. I see no reason for applying the rule to one who slaughters and sells to his customers for immediate consumption, and denying its application to one who slaughters and sells to another to be retailed by him. In each case it is fresh meat intended for immediate consumption.

The rule is well settled by the courts of last resort in many of the states that a vendor of an article manufactured by him for a particular use, impliedly warrants it against all such defects as arise from his unskillfulness either in selecting the materials or in putting them together and adapting them to the required purpose. (See cases cited in Albany Law Journal, vol. 18, page 324.)

One who prepares meat for the wholesale market may be said to come within that rule. Because he purchases the cattle;

determines whether they are healthy and in proper condition for food; and upon his skill in dressing and preparing the meat for transportation a long distance, its quality and condition as an article of diet for the consumer largely depends.

In two of the states at least, it is held that where perishable goods are sold to be shipped to a distant market, a warranty is implied that they are properly packed and fit for shipment, but not that they will continue sound for any particular or definite period. (*Mann* v. *Everston*, 32 Ind. 355; *Leopold* v. *Van Kirk*, 27 Wis. 152.)

The respondent insists that the act of defendants' agent in selling some sixty quarters of the beef, before the car reached Elmira, when the defendants, after making a personal examination, immediately shipped that which remained unsold to the plaintiff, constituted a waiver of their claim for damages. It is undoubtedly the rule that in cases of executory contracts for the sale and delivery of personal property, if the article furnished fails to conform to the agreement, the vendee's right to recover damages does not survive an acceptance of the property, after opportunity to ascertain the defect, unless notice has been given to the vendor, or the vendee offers to return the property. (*Reed* v. *Randall*, 29 N. Y. 358; *Beck* v. *Sheldon*, 48 N. Y. 365; *Coplay Iron Co.* v. *Pope*, 108 N. Y. 232.)

But when there is an express warranty it is unimportant whether the sale be regarded as executory or *in presenti*, for it is now well settled that the same rights and remedies attach to an express warranty in an executory, as in a present sale. (*Day* v. *Pool*, 52 N. Y. 416; *Parks* v. *Morris Ax & Tool Co.*, 54 N. Y. 586; *Dounce* v. *Dow*, 57 N. Y. 16; *Briggs* v. *Hilton*, 99 N. Y. 517.)

In such cases the right to recover damages for the breach of the warranty survives an acceptance, the vendee being under no obligation to return the goods.

Indeed his right to return them upon discovery of the breach is questioned in *Day* v. *Pool*, *supra*. And Judge Danforth in *Briggs* v. *Hilton*, *supra*, after a careful review of the leading authorities upon the question states the rule as follows: "Where there is an express warranty, it is, if untrue, at once broken and the vendor becomes liable in damages but the purchaser cannot for that reason either refuse to accept the goods or return them."

It follows from the views expressed that the judgment should be reversed.

All concur, except FOLLETT, Ch. J., not sitting.

Judgment reversed.

BEEMAN v. BANTA.

(118 New York, 538.—1890.)

PARKER, J. The recovery in this action was for damages claimed to have been sustained because of a breach of an express warranty on the part of the defendant to so construct a freezer for the plaintiffs as that chickens could be kept therein in perfect condition.

The jury have found the making of the warranty, its breach and the amount of damages resulting therefrom. The General Term have affirmed these findings and as there is some evidence to support each proposition, we have but to consider the exceptions taken.

The appellant excepted to the charge of the court respecting the measure of damages. Upon the trial he insisted, and still urges, that the proper measure of damages is the cost of so changing the freezer as to obviate the defect and make it conform to the warranty, and *N. Y. S. Moniter Milk Pan Co.* v. *Remington*, 109 N. Y. 143, is cited in support of such contention. That decision was not intended to, nor does it modify, the rule as recognized and enforced in *Passinger* v. *Thorburn*, 34 N. Y. 634; *White* v. *Miller*, 71 N. Y. 133; *Wakeman* v. *Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205; *Reed* v. *McConnell*, 101 N. Y. 276, and kindred cases.

In that case the argument of the court demonstrates: First, that improper evidence was received; and second, that the finding of the referee was without evidence to support it. No other proposition was decided. And the discussion is not applicable to the facts before us.

The plaintiff was largely engaged in preparing poultry for market which he had either raised or purchased. Before meeting the defendant he had attempted to keep chickens for the early spring market in a freezer or cooler which he had con-

structed for the purpose. The attempt was unsuccessful and resulted in a loss. The jury have found in effect that the defendant, with knowledge of this intention of the plaintiff to at once make use of it in the freezing and preservation of chickens for the May market following, expressly represented and warranted that for about $500 he would construct a freezer which should keep them in perfect condition for such market.

That he failed to keep his contract in such respect, resulting in a loss to the plaintiff of many hundred pounds of chickens.

The court charged the jury that if they should find for the plaintiff, he was entitled to recover, as one of the elements of damage, the difference between the value of the refrigerator as constructed, and its value as it would have been if made according to contract. The correctness of this instruction does not admit of questioning. Had the defendant made no use of the freezer, such rule would have embraced all the damages recoverable. But he did make use of it, and such use as was contemplated by the contract of the parties. The result was the total loss of hundreds of pounds of chickens.

The fact that the defendant well knew the use to which the freezer was to be immediately put, his representation and warranty that it would keep chickens in perfect condition, burdens him with the damage sustained because of his failure to make good the warranty.

Upon that question, the court instructed the jury that the plaintiff was entitled to recover the value of the chickens less cost of getting them to market, including freight, and fees of commission merchant.

The question of value was left to the jury, but they were permitted to consider the evidence tending to show that frozen chickens were worth forty cents a pound in the market during the month of May.

Such instruction we consider authorized. The object of the freezer was to preserve chickens for the May market. The expense of construction, and trouble, as well as expense of operation, was incurred and undertaken in order to secure the enhanced prices of the month of May. It was the extra profit which the plaintiff was contracting to secure, and in so far as the profits contemplated by the parties can be proven, they may be considered. Gains prevented as well as losses sustained are proper elements of damage. (*Wakeman* v. *Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205.)

We have carefully examined the other exceptions to the charge as made and to the refusals to charge as requested, and also the exceptions taken to the admissibility of testimony, but find no error justifying a reversal.

The insistence of the appellant that the judgment be reversed because against the weight of evidence, may have been entitled to some consideration by the General Term, but it cannot be regarded here.

The judgment should be affirmed.

All concur, except FOLLETT, CH. J., and VANN, J., not sitting.

Judgment affirmed.

PAYNE v. WHALE.

(7 East, 274.—1806.)

THIS was an action for money had and received, to recover back the price of a horse which had been warranted sound by defendant to plaintiff. Shortly after the original bargain was made and the money paid, the plaintiff observed that the horse was a roarer and unsound, and thereupon tendered back the horse, and demanded his money; the defendant admitted that he had made the warranty, but denied the unsoundness, and refused to take back the horse or return the money; but told the plaintiff that if the horse were unsound, he would take it again and return the money. At the trial it was proved that the horse was a roarer and unsound.

LORD ELLENBOROUGH, C. J. This was a cause tried before me at Guildhall to recover back the price of a horse sold as a sound horse, and which proved to be unsound. It was to be collected from the evidence, that there had been a warranty of soundness at the time of the original contract of sale: but in a subsequent conversation, when the plaintiff objected that the horse was unsound, the defendant said, that if the horse were unsound, he would take it again, and return the money. And it was contended that the action for money had and received would not lie, upon the authority of *Power* v. *Wells* and *Weston*

v. *Downes*, because this was no other than a mode of trying the warranty, which could only be by a special action on the case. It had occurred to me at the trial, that the defendant, by means of his promise to return the money and take back the horse if it were unsound, had placed himself in the situation of a stakeholder, and therefore that on proof that the horse was unsound he was to be considered as holding the money for the use of the plaintiff. But upon further consideration I am clearly satisfied that that promise did not discharge the original warranty, and that the party complaining of the breach of that warranty must still sue upon it. The second conversation is not to be considered as an abandonment of the original warranty, the performance of which the defendant still insisted upon; but rather as a declaration that if the warranty were shown to be broken, he would do that, which is usually done in such cases, take back the horse and repay the money. Then when any question on the warranty remains to be discussed, it ought to be so in a shape to give the other party notice of it, namely, in an action upon the warranty.

Nonsuit to be entered.

Day et al. v. Pool et al.

(52 New York, 416.—1873.)

Peckham, J. Action for damages for alleged breach of warranty upon a contract to sell and deliver to plaintiffs, at a future day, eighty barrels of rock-candy syrup. The contract of sale with warranty was proved, or sufficiently so for the jury, and the breach; but it also appeared in proof that the plaintiffs, after receiving the syrup, and discovering its failure to comply with the warranty, proceeded to use it in their business of wine manufacture, and neither returned nor offered to return it. Upon this ground the plaintiffs, on defendants' motion, were nonsuited at the circuit. It appeared that the plaintiffs required and desired to purchase for their business, in a western county, an article of rock-candy syrup "that would not crystallize, or the sugar fall down," in its use.

This the defendants, merchants in the city of New York, un-

dertook to sell to them, and to warrant in these respects. The syrup was manufactured in Boston; but samples of the syrup were shown at the time of the contract to the plaintiffs. It was to be ordered by defendants from Boston. It was all to be sent to plaintiffs by the fifteenth of October then next, in two car loads.

It was in fact delivered in small parcels, at different times, up to the last of November.

The plaintiffs complained of the deficiency of the syrup at various times to the defendants while they were delivering it; at one time sent a sample of that already received, complaining of its deficiency; and the defendants promised to correct it (though they insisted it was then sound). If not, they could "do it at the end." The plaintiffs paid for the syrup in full before suit.

The question presented is, did the plaintiffs' claim for damages survive their acceptance and use of the syrup, or were they bound to return or offer to return the defective syrup as soon as its deficiency was discovered? In other words, were they bound to rescind the contract, or could they use the syrup and rely upon their warranty?

There seems very little authority upon this precise point in this State, viz., as to an executory sale, with warranty as to the quality of the article contracted for.

It is well settled that, upon a sale and delivery *in presenti* of goods with express warranty, if the goods upon trial or full examination turn out to be defective, and there is a breach of the warranty, the vendee may retain and use the property, and may have his remedy upon the warranty without returning or offering to return. In fact, it seems to be regarded as settled in this State, though, perhaps, not necessarily determined in any case, that he has no right to return the goods in such case, unless there was fraud in the sale. It is not necessary to decide that point in this case. (*Voorhees* v. *Earl*, 2 Hill, 288; *Muller* v. *Eno*, 14 N. Y. 597; *Best* v. *Eckle*, 41 id. 488; *Foote* v. *Bentley*, 44 id. 166; see, also, Story on Sales, § 421, and cases cited; *Thornton* v. *Wynn*, 12 Wheat. 183.)

In Massachusetts and in Maryland the vendee has his option to retain and use the property and recoup, or sue on his warranty; or he may return it, rescind and sue for the consideration. (*Dorr* v. *Fisher*, 1 Cush. 271; *Bryant* v. *Isling*, 13 Gray,

607; *Hyatt* v. *Bayle*, 5 Gill & J. 121; *Franklin* v. *Lang*, 7 id. 407; *Butler* v. *Blake*, 2 Har. & J. 350.)

In addition to the mere contract of sale, in an executory as well as on a sale *in presenti*, a vendor may warrant that the article shall have certain qualities. This agreement to warrant in an executory contract of sale is just as obligatory as a warranty on a present sale and delivery of goods. Is there any reason why the vendee, in such executory contract of sale, may not rely upon that warranty to the same extent as upon a warranty in a present sale and delivery of property?

Had this syrup been all present when purchased, and the plaintiffs (the purchasers) given it all reasonable examination, without any actual trial, there could have been no legal objection to the defendants' warranty, that it would "not crystallize, or the sugar fall down," in its use.

Upon such a warranty the plaintiffs might have used the syrup without returning it, though found to be defective, and relied upon their warranty. This is well settled law.

Why might they not likewise rely upon a like warranty in this executory contract?

I confess myself unable to see any controlling reason for a legal difference.

In a present sale with warranty it is expected, of course, that the vendor incurs the peril of defects being developed, in the property warranted, after its delivery to the purchaser. He warrants against that. He does precisely the same upon a warranty in an executory contract.

If it be dangerous to allow this defect to be discovered by the purchaser in the one case, without any return of the property, it is no more so in the other.

I see no reason why the same rights and remedies should not attach to a warranty in an executory as in a present sale, and no greater. The purchaser in an executory sale could not rely upon a warranty as to open, plainly apparent defects any more than he could in a sale *in presenti*.

The appellant greatly relies upon the *nisi prius* case of *Hopkins* v. *Appleby*, 1 Stark. 388, tried before Lord Ellenborough, which was an action for goods sold and delivered, warranted to be of the best quality Spanish barilla and salt barilla. The defendant had consumed the article purchased in eight successive bailings, without giving notice of its defect or offering

to return it; and he attempted to show that the quality could not be ascertained by mere inspection without actual experiment. Proof to the reverse of this was also given. The court held that he ought to have given notice of the defect in an early stage, so that the vendor might have sent there and ascertained the cause of the failure; and be disallowed the claim.

That case has not been followed in the English courts. It is distinctly overruled in *Poulton* v. *Lattimore*, 9 Bar. & Cr. 259. There the buyer neither returned the seed bought nor gave any notice of its defect; but as there was an express warranty, the defects, by the breach thereof, were allowed to defeat the action for the price. This in 1829.

Nor does it seem to have been the law of England prior to that decision. (*Fielder* v. *Starkin*, 1 H. Bl. 17; and see Story on Sales, § 405, and cases there cited; also § 422, and note 2, and cases cited.)

The counsel also insists that the cases of *Reed* v. *Randall*, 29 N. Y. 358, *McCormick* v. *Dawkins*, 45 id. 265, and cases there referred to, sustain this nonsuit. Neither was a case of warranty; and each one that speaks upon the subject expressly excepts the rule there laid down from a case of warranty as inapplicable.

In *Neaffie* v. *Hart*, 4 Lans. 4, there was claimed to have been an implied warranty. The court held that it was not taken out of the rule of the above cases.

In my opinion, where there is an express warranty the purchaser, whether in an executed or an executory sale, is not bound to return the property upon discovering the breach, even if he have the right to do so.

See the cases as to the right to return property purchased upon warranty, before cited; also those from Massachusetts and from Maryland; also *Messenger* v. *Pratt*, 3 Lans. 234. All agree that he is not bound to return property warranted upon discovering the breach. *Reed* v. *Randall*, 29 N. Y., would have been decided the other way had there been an express warranty as to the quality of the tobacco. The court held there was no warranty, and that was the ground of the judgment.

Foot v. *Bentley*, 44 N. Y. 166, substantially decides this case. The action in respect to the warranty was held to lie, though the tea was not returned when its defects were discovered; but

the judgment was reversed upon another ground. (*Muller* v. *Eno*, 14 N. Y. 597.)

The maintenance of this action does not at all conflict with *Hopkins* v. *Appleby*, *supra*.

Here notice was given of the defects in the syrup at an early stage, and the defendants promised to attend to it. They also apparently acquiesced in the plaintiffs' use of it, virtually promising to make it right if it did not prove to be sound rock-candy syrup. It would scarcely be just now to allow the defendants to take advantage of the non-return of the syrup under such circumstances.

Of course, there is danger of fraud and false claims, even where there is an express warranty, when notice is not early given of the defect. It leads the buyer into temptation. Hence, juries should listen to such claims (never presented when their falsity could have been ascertained) with great caution. The proof thereof should be more clear than if the buyer had acted with the frankness of an honest man, willing to allow his claims to be tested. This is so declared by courts, while the rule is maintained as to an express warranty as above stated.

The order of the General Term granting a new trial is, therefore, affirmed, and judgment absolute given for the plaintiffs.

GROVER, FOLGER and RAPALLO, JJ., concur.

CHURCH, Ch. J., ALLEN and ANDREWS, JJ., dissent.

Order affirmed and judgment accordingly.

ZABRISKIE v. CENTRAL VERMONT R. R. CO.

(131 New York, 72.—1892.)

APPEAL from judgment of the General Term of the Supreme Court which affirmed a judgment in favor of the defendant, entered upon the report of a referee.

Per Curiam. After the argument of this case and consultation thereon, the judges concluded that the judgment should be affirmed, and Chief Judge Ruger was selected to write the

opinion of the court. He entered upon that duty, and before he had fully completed his opinion he was stricken down with the disease which soon terminated in his death. He had written enough to justify the affirmance of the judgment, and we now adopt his opinion as the opinion of the court. That opinion and the able and elaborate opinion delivered by the referee and at the General Term fully answer the argument now made on behalf of the appellant, and it would be a useless task to write more. The opinion is as follows:

RUGER, Ch. J. This action was brought by the plaintiff to recover the contract price of a certain quantity of coal sold and delivered by Robert Hare Powell & Co. and their assignee, the Guarantee Trust and Safe Deposit Company, to the defendant after June, 1887, and which claim was assigned by the vendors to the plaintiff.

This coal was furnished by the vendors to the defendant under a written contract made June 8, 1887, between Powell & Co. and the defendant, whereby the said vendors agreed to sell and deliver to the defendant, during the year ending June 1, 1888, at Norwood, N. Y., 30,000 tons of "Powelton coal, of same quality and kind as furnished you during the past year," at $3.00 per net ton.

The same vendors had furnished the defendant a quantity of Powelton coal the previous year which had been approved as satisfactory by the defendant. Under the contract of 1887 Powell & Co. had, previous to August 29, 1887, delivered to the defendant on its contract, upwards of four thousand tons of coal, and on that day they assigned their contract to the Guarantee Trust and Safe Deposit Company, who continued delivering coal until they were stopped by the absolute refusal of the defendant to receive any more coal from them of the kind already delivered. The assignee of the contract had, up to this time, delivered about five hundred tons, leaving some twenty-five thousand tons yet undelivered to complete the performance of the contract.

Immediately after the defendant had had an opportunity to test the first delivery of coal, and until it ceased altogether, it uniformly and constantly complained of the quality of the coal delivered to it, and objected that it did not correspond, either in quality or kind, with the coal delivered to the company in the year 1886. The defendant, however, was induced to con-

tinue to receive and to test the coal actually delivered by the representations and promises made by the plaintiff's assignors that the quality of the coal thereafter delivered should be improved, and that upon trial it would be found to work more satisfactorily. Various interviews took place between the agents of the defendant and the plaintiff's assignors, and several examinations were made by them after the coal was delivered and in possession of defendant, and the vendors uniformly promised to improve the quality of the coal delivered, and predicted that the future deliveries would, upon actual experiment, prove to conform to the quality of the coal described in the contract, and that compensation for the damages caused by the inferior quality of the coal already delivered, should be adjusted.

It was found by the referee that practically all of the coal delivered under the contract was greatly inferior to that furnished in the year 1886. It is clearly inferable from the findings of the referee, as well as the evidence, that the great bulk of the coal was received by the defendant at the earnest solicitation of the vendors and for the purpose of testing its quality and determining whether the vendors would be able to make its quality conform to the obligations of their contract. It is also evident from the findings that this effort was an unqualified failure.

It is contended by the plaintiff that there was no warranty of the quality of the coal sold, and that, by its acceptance, the defendant had precluded itself from claiming damages for a breach of contract.

A satisfactory answer to this claim appears in the fact that it is not found or shown that the defects in the coal were visible on inspection; but, on the contrary, it negatively appears from the conduct of both the vendors and vendee that they were not discernible on inspection. A further answer to this point is found in the proposition that the evidence authorized the finding that there was a warranty as to the quality of the coal sold.

The contract in this case calls for Powelton coal of the "same quality and kind as furnished" by the vendors to the defendant the preceding year. It calls for coal of a particular quality and kind, determinable by a standard which was equally well-known and understood, both by the vendors and the pur-

chaser. While the term "Powelton coal" may be said to be a descriptive term, merely; when it is said that the coal was to be Powelton coal of the same quality and kind as that delivered in the previous year, it goes beyond mere words of description, and refers to the intrinsic value of the goods sold in language which cannot be misunderstood, and can be satisfied only by a consideration of its fitness to perform the work required of it in the defendant's business. That this was the theory of the vendors while the coal was being delivered, is quite evident from their request that it should not be prematurely judged by its appearance alone, but should be determined by positive trial and the results shown by actual use and experiment. It comes, therefore, with ill-grace from the vendors now to insist that the defects in the coal were so perceptible on inspection that the defendant should be barred by its acceptance, when they themselves had induced that acceptance only by the assurance that the working quality of the coal would show that the defects visible on inspection were apparent and not real.

We are, however, of the opinion that, upon the evidence, the contract contained a warranty of quality which survived the acceptance of the goods. The principle is well established that, upon an executory sale of goods by sample, with warranty that the goods shall correspond with the sample, the vendee is not precluded from claiming and recovering damages for breach of warranty, although he has accepted the goods after an opportunity for inspection. (*Kent* v. *Friedman*, 101 N. Y. 616; *Brigg* v. *Hilton*, 99 id. 517; *Gurney* v. *Atlantic & Great Western R. Co.*, 58 id. 358.)

We are, also, of the opinion that the sale in question was, practically, a sale by sample. Although the standard selected for comparison was not present, or in existence, even, at the time of the sale, its qualities had been observed and demonstrated, and were capable of exact ascertainment by the evidence of those who had witnessed the results produced by the consumption of the coal. It was unnecessary for the purpose of effecting a comparison of the respective qualities of the two specimens of coal that they should be present and compared side by side, or tested at the same time. The capacity of coal for generating heat and steam determines its value, and it is only by the destruction of the subject that a standard can be created for comparison. The comparison does not depend upon

considerations of external correspondence and appearance, and this was obviously the view which these parties took of the question while negotiating as to the continuance of the deliveries of coal under this contract.

The standard selected for testing the quality of the goods sold was considered sufficiently definite and precise by the parties to the contract, and it does not appear that there was any difficulty in practice in applying it to the subject.

A contract of sale which points out a known and ascertainable standard by which to judge the quality of goods sold, is, for all practical purposes, a sale by sample, and renders the vendor liable for damages upon a breach of warranty, although there has been an acceptance after opportunity to inspect the goods. The cases of *Coplay Iron Co.* v. *Pope*, 108 N. Y. 232; *Studer* v. *Bleistein*, 115 id. 316; *Pierson* v. *Crooks*, id. 539, and other cases of like character are clearly distinguishable, inasmuch as one is a contract concerning a sale by sample and the others were executory contracts for the manufacture and sale or delivery of goods of a particular description. In cases of the latter character, where the quality of goods is capable of discovery upon inspection, and where, after full opportunity for such inspection, the goods are accepted and no warranty attends the sale, the vendee is precluded from recovering damages for any variation between the goods delivered and those described in the contract.

It is also contended by the appellant that the defendant could not counter-claim the damages arising out of the inferior quality of the coal against the price of the coal delivered by Powell & Co.'s assignee.

There was no new contract made between the defendant and Powell & Co.'s assignee, and the coal delivered by such assignee was evidently delivered in performance of Powell & Co.'s contract. It was probably supposed by the assignee that through the performance of Powell & Co.'s contract it might realize a larger sum from the assigned property than it otherwise could. It thus, without supposing any special arrangement necessary, continued supplying coal to the defendant. The coal, however, was of the same inferior quality as that previously delivered by Powell & Co., and the defendant finally, after the delivery of an inconsiderable quantity by the assignee, refused absolutely to receive any more. The assignee, however, had an absolute

right to perform Powell & Co.'s contract, although under no legal obligation to do so. He chose to attempt its performance and the defendant had no power or right to prevent it. It, therefore, received all the coal delivered in performance of that contract, relying upon its contract for indemnity against loss on account of its inferior quality. While the defendant was under no legal obligation to receive inferior coal from the assignee, it yet had a right to receive it conditionally and apply it upon the obligations of the contract.

It cannot be that either the assignee or the defendant had any other idea with reference to the delivery of coal by the assignee than to fulfill the contract which the assignee had secured by assignment from Powell & Co.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

BRIGG ET AL. v. HILTON ET AL.

(99 New York, 517.—1885.)

APPEAL from judgment of the General Term of the Court of Common Pleas of the city of New York affirming judgment in favor of defendants.

DANFORTH, J. There is no pretense that the plaintiffs were guilty of any fraud. The learned counsel for the defendants disclaimed it upon the trial and stated that the claim was "for a breach of warranty." The law of the case as stated without objection by the trial judge will not allow the sale to be treated as one by sample, and the first point made by the appellants is "that there was no evidence of a warranty." Of course if that is so a verdict should have been entered for the plaintiffs. The appeal papers do not show that the case was settled by the trial judge, nor that they are copies of the record, nor is there any index. These things are required by the statute, the rules or practice of the court, and should be performed to insure certainty and facilitate reference to the proceedings. (*Dow* v. *Darragh*, 92 N. Y. 537.) Assuming the record to be correct,

however, it seems quite apparent that there was evidence upon which the jury could fairly come to the conclusion that an express warranty was the inducement to the purchase. In the transaction B. represented the defendants, and E., one of the plaintiffs, acted in person. He first called at defendants' store with samples of English cloakings, and learning from B. that he was engaged, left them for examination; he came again, exhibited samples which were "sound, perfect, even goods," and with those B. was satisfied; he says the weight, width and style of the goods were talked over, and the price and terms of sale. Asked, "was any thing said with reference to the quality of the goods corresponding with the samples," he replied, "They were to be of similar fabric and similar quality;" and his attention being again called to the conversation between E. and himself at the time the order was given, he says, "The width was stated, the weight was stated, the general characteristics of the goods all through were stated to be equal in every respect to the sample," indeed "better in the piece than the sample." There is evidence from the plaintiffs in contradiction and of variance between the present testimony of B. and that given by him on a former trial and other circumstances which might indicate uncertain memory or vacillation on his part. But these circumstances were for the jury to consider in determining his credibility. Their answer to the specific question put to them as well as the general verdict shows that they relied upon it. The testimony referred to was, however, brought out under the plaintiffs' exception to its admissibility. It appeared that at the time of the bargain the plaintiffs gave to the defendants a writing which, so far as is material, is in these words:

"NEW YORK, March 5th, 1880.

"Order from Messrs. A. T. STEWART & Co.

"To BRIGG, ENTZ & Co.

"10 pieces fancy cloakings, 1,311, @ $3.20."

(Followed by other similar items but of different numbers.)

"10 pieces fancy cloakings, 1,246, @ $3.25."

Also followed by similar items, making in all "120 pcs."

"Delivery 1–2 in June,
1–2 in July.

"BRIGG, ENTZ & Co."

It was conceded that the goods referred to therein as "$3.25," were the goods in question, and the plaintiffs having put the paper in evidence, "objected to any oral testimony tending to set up a warranty with regard to the sale of these goods, on the ground that it contains the contract between the parties in relation to them." We think the instrument cannot be so construed. It acknowledges an order for certain articles, a period of delivery and a price. It is an admission of these things by the party signing it, and not at all the contract of both—a mere memorandum to show what had been ordered, that one party might know what they were to supply, and the other what they were to receive, and so avoid a double order. It contains no promise nor undertaking. It does not sell the goods nor does it assume to do so. It was not intended to be a contract. "It went to Europe," E. says, "to the manufacturer," a copy was entered in the plaintiffs' book and a copy given to the defendants. It afforded information by which each of these parties might be guided, and can at the utmost be considered as the recital of things which had been agreed upon, not as an agreement in itself. (*Union Trust Co.* v. *Whiton*, 97 N. Y. 172.) But even an agreement may be valid although only a part is in writing, and while as to that part the writing is conclusive, parol evidence may be used to show the rest. (*Chapin* v. *Dobson*, 78 N. Y. 74.) We think, therefore, no error was committed by the trial court in receiving the parol testimony, and under it and the verdict of the jury, an express warranty as to the quality of the goods agreed to be furnished, must be deemed established.

It was proved that the goods were delivered in August and September, and paid for in October and November. The defendants, therefore, had ample opportunity to examine them, and had they done so it is conceded that the defects now complained of would have been discovered. These circumstances are also relied upon by the plaintiffs as an answer to the defendants' counter-claim. But where a sale is made in good faith, with a warranty of quality as part of the contract, it is sometimes said to be not even voidable (Pollock's Princ. of Cont. 422; *Voorhees* v. *Earl*, 2 Hill, 288, where the English cases and others are examined), and at other times that the vendee is not bound to rescind the contract, but may, if he elects, use the article and rely upon the warranty. The first part of this proposition was thought by Peckham, J. (*Day* v. *Pool*, 52 N. Y.

416), to be regarded as settled in this State, but it is not material here. The defendants stand, if at all, on the last alternative, and are supported by *Muller* v. *Eno*, 14 N. Y. 597, a case very much like the present. The goods there in question had indeed been manufactured, but at the time of sale were in the bonded warehouse unopened and were thence delivered to the purchaser in the original packages. I do not see that this circumstance at all affects the principle on which the rights of the parties depend. In the case cited the sale was by sample, with warranty that the goods corresponded with it. In the case before us specimens of cloth were exhibited to the purchaser with a warranty that those to be furnished should be of like quality. In both the articles shown were sound goods. It is difficult to see why in one case as in the other the party promising should not perform his engagement, or failing to do so, render just compensation to him who relied upon the promise. Nor can it be material whether the liability for breach of is enforced by a direct action for damages, or by way of counter-claim, or when sued for the price as in *Muller* v. *Eno*, *supra*, by way of recoupment. In that case it is said the claim is not barred by the continued possession of the goods, by circumstances of delay in giving notice to the vendor, nor even by omitting altogether to give such notice and using or selling the property. Although the articles when ordered had no existence, the contract between the parties was an executory agreement for sale of goods and not for work or labor in producing them, so was that in *Muller* v. *Eno*, *supra*. In each case there was an express warranty. The rule there applied seems decisive of the question before us.

In *Day* v. *Pool*, 63 Barb. 506, affirmed in this court, 52 N. Y. 416, the circumstances were in a more literal sense like those before us. The action was for an alleged breach of warranty in an executory contract for the sale and delivery of rock-candy syrup. The defendants were dealers in syrups in the city of New York, and the plaintiffs were wine makers in Chautauqua county. It appears that at the time of sale the syrup was not manufactured, but was subsequently to be procured by the defendants of the manufacturers in Boston. A sample was exhibited and an order given for syrup of that description.

There was also on the part of the vendors an express warranty as to quality. The syrup was delivered in different lots. The evidence warranted a finding, and it was not controverted by

the plaintiffs, that the quality of the syrup could be detected on examination before using, and that it was in fact discovered and known to them at the time they used it, but although found not to correspond either in kind or quality with that agreed to be sent, it was not returned but used and paid for. At the trial the plaintiffs were nonsuited upon the ground that the agreement being executory, and the syrup delivered and received under it with knowledge of its quality, and converted by the plaintiffs to their own use, without notice to the defendants that they would not receive the same upon the contract, or any offer to return it, they could not recover. The nonsuit was set aside and a new trial granted by the Supreme Court, Fourth Department, after a careful examination of earlier decisions. Upon appeal by the defendant to this court the order was affirmed, and the plaintiffs had judgment absolute upon the ground as stated by Peckham, J., that the same rights and remedies should attach to a warranty in an executory as in a present sale, and that where there is an express warranty, the purchaser in neither case is bound to return the property upon discovering the breach, even if he have the right to do so. It is true that in both courts very able judges dissented, but the precedent has been since followed in *Dounce* v. *Dow*, 57 N. Y. 16, and *Gurney* v. *At. & G. West. R. R. Co.*, 58 id. 358, where the judges who dissented in *Day* v. *Pool* concurred, giving judgment upon the doctrine of that case, and again in *Dounce* v. *Dow*, *supra*, where after a new trial it came to this court (64 N. Y. 411), and was recognized by the then chief judge, who had dissented in *Day* v. *Pool*, as establishing that by an executory agreement for sale and delivery of an article of a particular quality, a warranty is established which will survive the acceptance of the article.

In *Parks* v. *Morris Axe and Tool Co.*, 54 N. Y. 586, after referring to *Muller* v. *Eno* and *Day* v. *Pool*, the court held in a case properly calling for such decision, that a warranty might accompany an executory contract and be enforced as such. Indeed, the principles of law applicable to either case should now be deemed well settled. If the sale is of existing and specific goods, with or without warranty of quality, the title at once passes to the purchaser, and where there is an express warranty, it is, if untrue, at once broken, and the vendor becomes liable in damages, but the purchaser cannot for that reason either refuse to accept the goods, or return them. If the

contract is executory, and the goods yet to be manufactured, no title can pass until delivery or some equivalent act to which both parties assent, and when offered, the vendee may reject the goods as not answering the bargain, but if the sale was with warranty, he may receive the goods and then the same consequences attach as in the former case, and among others, the right to compensation if the warranty is broken.

It would seem, therefore, that the learned trial judge committed no error in denying the plaintiffs' motion for a verdict in their favor, or in submitting the case to the jury as one in which, if an express warranty was proven, the defendants might have damages. No fault was found by the appellants with the manner of that submission, or the instruction to the jury in respect to the question, nor any claim made either upon the motion for a nonsuit, or at the close of the case, or at any other time, that the defects constituting a breach were so "open and plainly apparent as to deprive the defendants of the benefit of the warranty." Only one exception to the charge was taken by the learned counsel for the plaintiffs, and that related to a different matter. The warranty was made in March. The evidence disclosed that after the arrival of the goods in New York, one of the plaintiffs carried to the defendants samples which he represented came with them. The defendants found them satisfactory and like the original samples. After this the goods were delivered. The trial judge directed the jury to inquire whether the defendants were thereby induced to refrain from examining the goods before acceptance. In a certain view of the case, the circumstance was one to be considered. The original samples were of sound goods and of suitable quality. The second samples were of the same kind and were delivered for the information of the defendants. The goods were then in the plaintiffs' possession and the assurance was to be implied from the plaintiffs' act that the articles were in fact as it had been represented they should be. It might at least be considered in determining whether the defendants had been guilty of unreasonable delay or neglect in examination. (*Dutchess Co.* v. *Harding*, 49 N. Y. 324.)

It was not suggested that there was no evidence upon which the jury might answer the question, nor that it was not within the issue. It is, however, unnecessary to discuss the exception, because the jury found specifically that there was an express

warranty of quality, and no fault was found with, nor exception taken to the instructions that in such a case the defendants were neither bound to return the goods, nor give notice of their defective character, but might use or sell the same and yet recover. Therefore, whether or not the acceptance of the goods was induced by this act of the plaintiffs, was immaterial.

The appellants make a further objection that the verdict was irregular and improper. In form it is unusual. It is quite likely it expresses some of the reasoning by which the jury reached their conclusion. The defendants asked to be allowed $7,269.53, or besides canceling the plaintiffs' demand, $5,299.53, with interest. The jury by their verdict say they allow the defendants $6,404.53, or deducting the plaintiffs' claim, $4,286.50. It is less than the evidence would have warranted. They show, also, how they arrived at this sum, and indicate an expectation or opinion, or, as the appellants construe the verdict, "recommended" that the damaged goods "be returned." The objection is to this clause. It should have been urged at the time the verdict came in and before it was recorded. The jury might then have been sent back to reconsider and correct it as they saw fit, either in form or substance. (*Warner* v. *N. Y. C. R. R. Co.*, 52 N. Y. 437.) The plaintiffs, however, were silent. But they had another opportunity. Judgment was entered. It recited in due form the trial of the issues and a general verdict for the defendants for the sum above stated, viz.: $4,286.53, and judgment accordingly. If the "recommendation" of the jury was of any significance or meaning, it was for the advantage of the plaintiffs, and could have been insisted upon by them. They were entitled to have the judgment conform to the verdict. So, also, it could be waived. With notice of the judgment in the form stated, they made no complaint of variance between it and the verdict, nor did they move to make it conform to the verdict. They should have done so. (*Williams* v. *Thorn*, 81 N. Y. 382; *De Lavallette* v. *Wendt*, 75 id. 579.) The clause, however, was properly treated by the court as surplusage, and in the judgment they corrected the verdict by dropping the superfluous parts, yet literally followed the finding which gave the sum stated "for the defendants." Thus both the verdict and the judgment pronounced distinctly upon the issue joined, and upon the whole issue; nothing else was material. The preamble amounted to nothing and could not

vitiate the rest. It was the proper subject of amendment, and the court could not hesitate, as an ancient judge expressed it, "to work the verdict into form and make it serve" (Hob. 54), not indeed, by adding or subtracting matter of fact, but perfecting it in point of form.

In *Taylor* v. *Willes*, 3 Croke, 219, an action of *assumpsit*, the jury found for the plaintiff and "assessed for damages thirty-three pounds, six shillings, eight pence, to be paid in dyeing, if by law it may be." The judgment given was that he should recover the sum stated for damages assessed by the jury. Upon error brought, the court held the assessment of damages good, "but that which is found after, void," and therefore the judgment was affirmed.

This is but an instance of the general rule that if juries find matter not submitted to them and not pertinent to the issue joined, it may be regarded as surplusage. (*Richmond* v. *Tallmadge*, 16 Johns. 312.) Within this rule we think the court below properly dealt with the question.

The exceptions to evidence have been examined. They seem unimportant and have been sufficiently considered by the General Term. We agree, therefore, in the conclusion reached by that court, and think the judgment and order appealed from should be affirmed.

All concur except RUGER, Ch. J., not voting.

Judgment affirmed.

GAYLORD MANUFACTURING CO. v. ALLEN.

(53 New York, 515.—1873.)

ACTION to recover balance due on a sale of a quantity of iron castings to defendant's intestate. Defendant counterclaims for breach of contract as to time of delivery and for breach of warranty of quality. Judgment for plaintiff was affirmed by the General Term of the Superior Court of the city of New York.

ALLEN, J. Whether the contract was made before, or on or after the 7th of January, 1865, is not material; or whether it

rested partly in parol and partly in writing, or otherwise. It would seem from the evidence that the principal negotiation was verbal, at a personal interview between the agents of the contracting parties at the works of the plaintiff at Chicopee and at Northampton, the parties visiting the latter place to inspect one of the machines for which castings were wanted, at which interview the referee was authorized to infer from the evidence that the character, description and quality of the castings, and the purposes for which they would be wanted, were understood by the parties; and that they parted, leaving nothing but the terms or prices at which the plaintiff would contract to furnish them undetermined. The evidence is that, at parting, the representative of the Chicopee Malleable Iron Works, the contracting party, and to whose obligations and rights the plaintiff has succeeded, was requested by the representative of defendant's intestate to inform him by letter the terms on which the company would take the contract or do the work. The letter was written on the seventh of January, stating the price per pound at which the castings would be made, and promising, if an order should be given, to put the patterns in the works as soon as they were received, and stating that the writer had no doubt that the first delivery would be made as required, and that monthly deliveries would be continued, and promising to make every exertion to complete the order as desired, concluding with a statement that, in all probability, the company would be able to meet every requirement, and expressing a hope to receive the order, and promising prompt attention. The reply to this was an order, under date of tenth of January, for a large number of castings of different descriptions and weights, with a specification of the date and times at which they would be wanted, and promising to send most of the patterns the next morning and the balance in a few days, except those for a pony machine, which would not be ready until spring, the order concluding with the expression of a hope that the company would be able to furnish the castings ordered in quantities according to the date specified, and of suitable quality. But following the signature to the order, the following note is added: "The above to be at sixteen cents (16 c.) per lb., as agreeable to your letter of January 7, 1864, and to be of the best quality and suitable to the purpose designed." No answer was made to this order, in writing or verbally, so far as appears; but the contract-

ing company—hereafter called the plaintiff, as the plaintiff has taken its place, under the contract—proceeded on receipt of the patterns to manufacture and furnish the castings. Whether the agreement was consummated by the letter of the seventh of January, fixing the price as found by the referee, or by that of the tenth of January, acceding to the terms and ordering the castings, is not material. There is no dispute that the contract was made substantially as found by the referee. Whether the addendum to the letter of the defendant's intestate is or is not a part of the contract, the legal effect is the same. The referee has not found that there was any warranty, express or implied, of the quality of the castings, or that they should be suitable to the purpose for which they were designed, and, so far as appears, was not requested to find such fact. There is no ground for complaint that the castings were not of the best of iron, and of the best quality as castings, after they were finished. The only objection to them was, that they were not well or sufficiently annealed, and were not for that reason suitable for the purpose for which they were required, or could not as readily or profitably be wrought and applied to such purposes as if they had been more perfectly or thoroughly annealed. The law would imply precisely that which the defendant's claim made a part of the express contract. This was an executory contract for the manufacture and sale of goods, and is distinguished from a sale of goods in existence, defined and specifically sold. A contract to manufacture and deliver an article at a future day, carries with it an obligation that the article shall be merchantable, or, if sold for a particular purpose, that it shall be suitable and proper for such purpose. (*Hargous* v. *Stone*, 1 Seld. 73, and cases cited by Judge Paige, at page 86; *Reed* v. *Randall*, 29 N. Y. 358; *Dutchess Co.* v. *Harding*, 49 id. 321.) Incorporating into the agreement the obligation which the law implies would superadd nothing to the contract, or vary its nature or effect the remedy upon it. (*Sprague* v. *Blake*, W. R. 64.) Whatever agreement there was, whether expressed or implied, was a part of the contract, and was not a special warranty or agreement collateral to it, and, in the absence of fraud or artifice in inducing an acceptance of the article, did not survive the execution and performance of the contract.

It is not intended to express an opinion as to the rule in case there were latent defects, or those which could not be discerned

at the time of the delivery or acceptance of the articles. But in the absence of fraud or latent defects, an acceptance of the article sold upon an executory contract, after an opportunity to examine it, is a consent and agreement that the quality is satisfactory and as conforming to the contract, and bars all claim for compensation for any defects that may exist in the article. The party cannot, under such circumstances, retain the property, and afterward sue or counter-claim for damages, under pretense that it was not of the character and quality or description called for by the agreement. (*Dutchess Co.* v. *Harding*, and *Reed* v. *Randall*, *supra*, and cases cited; *McCormick* v. *Sarson*, 45 N. Y. 265.) The dissents in the latter case were not to the principle decided, but to its application under the facts and circumstances of that case.

Although the referee has not found, in terms, that the quality of the castings was patent and easily to be discerned upon inspection and attempt to use them, and that the defendant had full opportunity to and did examine them and know their quality, the evidence clearly shows this to have been so, and the fact is clearly to be implied from the findings of the referee. It was the duty of the intestate, therefore, to return the defective castings at once, and, having omitted to do so, he must be deemed in law to have waived all objections to them. And the result is the same, whether the agreement as to the quality of the articles is implied or express. But the report of the referee is, that the intestate did object to some of the castings, and they were reannealed by the plaintiff, and returned to and accepted by the intestate; and that the residue of the castings were accepted and used without objection or complaint. This was a waiver of all objection to the quality of the articles, and an assent to accept them in performance of the contract. The report might have gone much further. The evidence would have warranted the referee in finding that the intestate voluntarily, after a delivery of some of the castings, and without claiming that they were not of the quality called for by the contract, employed the plaintiff to reanneal them, and agreed upon the price to be paid, and had others reannealed elsewhere, without making claim upon the plaintiff. The whole case shows that the castings were regarded at the time of the delivery and acceptance, and when their quality and condition was well known, as well by the intestate as by the plaintiff, as answering the description and call

of the contract; and that the claim that they did not do so was an after-thought, when the plaintiff had declined to accept the note of the intestate instead of the money for the balance due. There was no agreement to furnish the castings at any particular time, and the referee has so found.

As there were no breaches of the contract by the plaintiff established upon the trial, entitling the plaintiff to counter-claim for damages, it is unnecessary to examine the questions made as to the other and hypothetical findings of the referee, to the effect that if there was any failure of the plaintiff to perform the contract, either as to time or the quality of the articles, such failure was caused by the acts of the intestate, and was therefore excused. There were several objections and exceptions to evidence upon the trial, but no point is made upon them here, and no error seems to have been committed to the prejudice of the defendant in that respect. Upon the merits the facts found, as well as upon the law of the case, the plaintiff was entitled to a judgment. The offer of the plaintiff to deduct a specified sum from the claim as made for the "sake of peaceful settlement," at the same time insisting upon a legal right to demand the whole, not having been accepted by the intestate, is not binding upon the plaintiff, and cannot operate as an admission that any deduction should be made, and the defendant has failed to show that any particular sum should be deducted for castings returned or furnished in excess of orders.

The judgment must be affirmed.

All concur; Grover and Folger, JJ., concurring in result.

Judgment affirmed.

Gentilli v. Starace.

(133 New York, 140.—1892.)

Action upon a promissory note given for part of the purchase price of a quantity of wine.

Gray, J. The plaintiff, who was a commission merchant in New York city, sold to the defendant, who was engaged in the same business, certain wines through a broker; whose note of

the sale stated it to be of "169 cases Prosperi's Chianti Wine, just arrived per S. S. 'Trinacria' at the prices and terms hereinafter mentioned, to wit (giving quantities and prices). . . . All to be in good merchantable order. Delivery on steamer's dock. The said goods to be approved by buyer within three days after delivery. Terms, payment by notes for one-half the amount each, at 60 and 90 days respectively. . ."

The first note was paid and the present action is to recover upon the second note. This recovery is sought to be defeated by the defense of a failure of consideration, in that the wine, some time after the sale was completed, was discovered to be imperfect and unsound and hence, as it is contended, an express warranty that the wine was intrinsically sound and free from latent defects was broken. This warranty, the appellant argues, was conveyed by these words in the broker's note of sale: "All to be in good merchantable order."

We think his appeal must fail, for the reason that the contract of sale nowhere expresses or imports any agreement on the seller's part that the wine should be of any particular quality, or that any rights should survive to the buyer, after his acceptance, as against the seller, which would authorize him to attack the sale for defects in the condition of the wine, subsequently discovered. The wine was on the dock when sold and the complaint as to its unsoundness was made some three months afterward. It was justified by a chemical analysis of the wine made by a chemist, who gave it as his opinion, that the wine had been bottled while in a state of secondary fermentation. This condition, though possibly latent to the casual or ordinary taste at times, is, nevertheless, it was said, discoverable always by chemical tests.

For the court to hold that upon this sale, so effected, there was conveyed a warranty to [*by*] the seller, in the language used, that at any and all times subsequent to the acceptance of the wine it should, upon examination or test, be found a desirable article, free from latent defects or unsoundness, would, in my opinion, be an extreme and unwarranted application of the doctrine upon which the rights of purchasers are made to depend. It is the general rule in such cases that the existence of a warranty is to be determined by the circumstances of the particular case. That is the rule where a warranty is sought to be implied.

Where application is sought to be made of words of warranty in a contract, like these, they should be read in connection with the other language, and the warranty is to be interpreted according to the particular circumstances of the transaction.

In the present case, the plaintiff was not the manufacturer of the wine. It is not pretended that any fraud was practiced by him. The wine was on the dock subject to inspection, and three days after delivery were specified in the memorandum of sale as the time the buyer might take for approval. No knowledge was imputable to the seller, and the buyer's opportunities were quite as good as the seller's to judge of the wine for quality and condition. The buyer might have required any other form of express warranty, as to the wine he was about to purchase, than what he did; but he was content with a stipulation from the seller that it should all be "in good merchantable order," and that he might have three days to approve of it.

It might be said that a construction was placed upon their contract by the acts of the parties, for, within three days after the receipt of the wine in defendant's store, he made some objections as to cases, which examination showed to be wine-stained, and a claim was thereupon allowed by the plaintiff.

According to the evidence, and as in fact it was found by the referee, a chemical analysis could have discovered the alleged defects in the condition of the wine.

I think, under the circumstances of this case, where the seller was not the manufacturer; where the article sold was *in esse* and open to inspection and examination, and where no fraud is charged, nor existed, and the buyer claimed and was allowed his time to exercise his judgment and to approve of the subject of the transaction of sale, the acceptance and retention of the goods concluded him, and there was neither warranty nor agreement by the seller which survived the transaction. The principle of this conclusion, I think, is deducible from the authorities; several of which I cite without further reference. (*Parkinson* v. *Lee*, 2 East, 314; *Sprague* v. *Blake*, 20 Wend. 61; *Reed* v. *Randall*, 29 N. Y. 358; *Dounce* v. *Dow*, 64 id. 411.)

The contract in this case called for a delivery of that description of wine known as "Prosperi's Chianti Wine," which should be "in good merchantable order," and was to be "approved by the

buyer within three days." That kind of wine was in fact delivered, and the merchantable order of the goods was a fact which, though warranted, was to be ascertained by the buyer for himself within the delay allowed. It was open to the buyer, if he distrusted his judgment, or if for any reason he wished it, to require an express warranty to cover the quality, or other points about the wine. He did not do so and, under the terms of the contract of the parties, we should hold that as to the seller it was fully executed, and no warranty survived in favor of and available thereafter to the buyer.

For the reasons assigned the order appealed from should be affirmed, and, under the stipulation in the notice of appeal, judgment absolute should be ordered in favor of the plaintiff and against the defendant, with costs.

All concur.

Order affirmed and judgment accordingly.

Part V.

BREACH OF THE CONTRACT.

Mason v. Decker.

(72 New York, 595.—1878.)

Action to recover purchase-price of certain shares of stock.

Verdict for plaintiff was sustained by the General Term of the Superior Court of the city of New York.

Earl, J. There was evidence tending to prove, and the jury must have found, the following facts: In April, 1873, the plaintiff and defendant were stockholders in a corporation known as the New York Construction Company. The plaintiff owned 143 shares, the par value of which was $14,300. That corporation was in need of more funds, and a scheme was devised whereby each of the stockholders were to subscribe an instrument agreeing to furnish $7,000 and receive in payment certain bonds at fifty cents on the dollar. The plaintiff being reluctant or unwilling to subscribe the instrument, and the defendant being desirous that he should, for the purpose of inducing him to subscribe, the defendant agreed with him that if he would subscribe and pay the $7,000, and take the bonds, he, the defendant, would on or before the first day of July next ensuing take all the plaintiff's stock and the bonds, and pay him therefor what the stock and bonds had cost him, with interest. On the faith of this agreement the plaintiff subscribed the instrument, and he agreed to sell his stock and the bonds on the terms proposed by defendant. The defendant subsequently took and paid for ten shares of the stock. Subsequently, the defendant being unwilling or reluctant to carry out his agreement, the parties met on the 30th day of June, 1873, and compromised or changed the April agreement, so that the defendant should be required to take only the stock, and then made an agreement, the terms of

which were embodied in the following writing executed by the defendant and delivered to the plaintiff:

"I, N. H. Decker, of New York city, agree to buy of Thomas F. Mason, also of New York city, thirteen thousand three hundred ($13,300) dollars of the capital stock of the New York Construction Company of the city of New York, at cost and interest from the several dates on which the installments were paid in; to assume all the rights, benefits, obligations and liabilities arising therefrom, and to pay for the said stock on October 10, 1873, or at my option for the whole or any part, at any time previous thereto, with the understanding that as payments are made the stock shall be transferred subject to my order.

"Witness my hand the 30th day of June, 1873.

"N. H. DECKER."

At the same time the plaintiff agreed to sell his stock to the defendant upon the terms mentioned in this agreement. At a proper time the plaintiff requested performance on the part of the defendant, and tendered to him the stock. The defendant declined to take the stock, and then this action was commenced.

It is claimed on the part of the defendant that the plaintiff cannot recover on the last agreement because it was not mutual, and that there was no consideration expressed in the paper to make the agreement on the part of the defendant binding upon him, for the reason that there was no agreement to sell. But there was ample consideration for the last agreement. The defendant was released from the prior agreement, which had become binding upon him by the part performance thereof, and the plaintiff agreed to sell and deliver the shares at the time the defendant executed and delivered to him the paper. The agreement of the seller to sell need not be in the paper signed by the purchaser. If the purchaser signs an agreement to buy, and delivers it to the seller, and he agrees by parol to sell upon the terms mentioned in the paper signed by the purchaser, there is a binding agreement which can be inforced against the purchaser. (*Justice* v. *Lang*, 42 N. Y. 493; *S. C.* 52 id. 323, and the opinion by Judge Allen in the same case when a third time in this court, not reported.) The defendant was therefore bound to take this stock, and the only other important question is as to the amount of the recovery to which plaintiff was entitled in this action.

The plaintiff sued for and recovered the purchase-price. He tendered performance on his part, and demanded payment of the defendant. In such a case, it is too well-settled to be longer disputed that the plaintiff could treat the stock as belonging to the defendant, and sue for and recover the price agreed to be paid for it. (Sedgwick on Dam. [5th ed.] 333; 3 Parsons on Con. [5th ed.] 208; *Des Arts* v. *Leggett*, 16 N. Y. 582; *Dustan* v. *McAndrew*, 44 id. 72.) In this State, in such a case, the seller has the election to consider the property his own, the buyer having forfeited his rights under the contract, or as belonging to the buyer. In the former case his remedy is to sue the buyer for damages for not taking the property, and the measure of his damages is the difference between the contract-price and the market-price. In the latter case, he may have either of two remedies, to wit: He may sell the property, acting as the agent of the buyer, and apply the proceeds upon the purchase-price, and sue for and recover the balance, if any; or he may sue for and recover the purchase-price. These two remedies are both based upon the theory that the title to the property by the contract and tender and assent of the seller had become vested in the buyer.

This discussion disposes of the most important exceptions taken by the defendant upon the trial. We have carefully considered the other exceptions, and they present no error for which the judgment should be reversed.

The judgment should be affirmed, with costs.

All concur, except MILLER, J., not voting; ALLEN, J., concurring in result.

Judgment affirmed.

BUTLER v. BUTLER.

(77 New York, 472.—1879.)

APPEAL from judgment of the General Term of the Supreme Court, affirming judgment in favor of plaintiff.

DANFORTH, J. The plaintiff submitted a proposition in writing to the defendant and it was in like manner accepted.

By it the plaintiff said: "I propose to furnish you, for your hotel in Luzerne, N. Y., one of Butler's Gas Generators and Holders. . . . The holder to be of sufficient capacity to contain fifteen hundred cubic feet of gas. To furnish all pipes to connect the generator with the holder, and the holder with the main pipe leading to the hotel; all weights and chains, sheaves and pulleys to support and balance the holder. All labor for putting up and setting the retorts, and hanging the holder, and connecting the pipes as before mentioned, and a sufficient air mixing meter, for the sum of fifteen hundred dollars. You (the defendant) are to furnish the tank and house for holder and generator and gallows frame for support of holder, to pay the freight on the machine from New York, and board one mechanic while putting up and connecting as above, exclusive of the cost of the machine and furnish one man to help rivet the gas-meter. I guarantee . . . that the machine shall be put up in the best and most workmanlike manner and all ready to make gas by June seventh, if your part of the work does not delay us. Payments to be $500 cash when the works are on that ground, $500 in one bond, due September 25, 1872, and $500 in one bond, due September 25, 1873, with interest."

The plaintiff in his complaint alleges that he "delivered the gas-works to the defendant at Luzerne in accordance with the contract;" avers a constant readiness on his part "to set the same up and make the connections in accordance with the agreement," but says, "the defendant has never permitted him to do so," and for breach, that the defendant, "except to pay freight charges on said gas-works, has wholly failed to perform the agreement on his part and has not paid the sum of $1,500, and for that sum, with interest, he demands judgment."

Upon the trial the referee found in accordance with the complaint, and among other things, "that the plaintiff delivered the gas-works to the defendant at Luzerne, that the extra expense which the plaintiff would have incurred to set the same up and make the connections is one hundred dollars" and, deducting that from the contract price finds, that the plaintiff is entitled to recover the balance and directs judgment therefor with interest from the 1st of July, 1871. The defendant excepted to these findings, and the exceptions, I think, are well taken. The contract is single and entire. If performed by the plaintiff he would be entitled to recover the full sum of $1,500,

part in cash, part in bonds. He was not to furnish materials and perform labor upon them for the defendant, but from his own materials and by his own labor furnish to the defendant properly affixed to his premises, a completed machine of a particular kind "all ready to make gas."

It is not pretended that this has been done; on the contrary, the defendant has not permitted him to do it,—and as the contract price is not divisible, there is no ground on which a recovery can be had for any part of it. (*Inchbald* v. *The Western, etc.*, 17 C. B. [N. S.] 733; *Blanch* v. *Cocheran*, 8 Bing. 14.) Nor is it in any sense true that the gas-works have been delivered to the defendant. Certain materials, among others, sheet and other kinds of iron; in bundles and rolls; castings, grates, rings, retort covers, and "one machine bottom," which, when properly arranged and joined together may compose a machine; were delivered by the plaintiff to a common carrier, who received them at "owner's risk." They were marked B. C. B., or B. C. B. for B. C. Butler, Luzerne, N. Y., and the defendant paid the freight upon them. Even these things did not thereby become his property; the freight was paid in execution of the contract, but the goods remained the goods of the plaintiff. If lost during transportation, or if destroyed after reaching the place of destination, the plaintiff would have to bear the loss. He could change their destination and make such use of them as he saw fit. His creditors could take them in execution (*Atkinson* v. *Bell*, 8 B. & C. 277), for the defendant was to have, not these articles, as separate parts or members from which by the application of skill and labor a machine could be constructed, but a complete thing, placed upon his own premises, of the required capacity and ready for use; and until that was furnished the property in these chattels did not pass from the plaintiff. (*Atkinson* v. *Bell*, 8 B. & C. 277; *Johnson* v. *Hunt*, 11 Wend. 137; *Tripp* v. *Armitage*, 4 Mees. & Wels. 698; *Andrews* v. *Dieterich*, 14 Wend. 35; *Andrews* v. *Durant*, 11 N. Y. 35; *Ward* v. *Shaw*, 7 Wend. 404; *Decker* v. *Furniss*, 14 N. Y. 611; *Clark* v. *Balmer*, 11 Mees. & Wels. 243.) Doubtless the plaintiff may in this, as in other cases where the performance of a contract has been prevented by the act or omission of the other party, recover what he has lost thereby, if anything, or the damages sustained, if any. (*Hosmer* v. *Wilson*, 7 Mich. 294.) Such a case, however, was not presented

to the referee, nor was it suggested by the pleadings. The plaintiff neither claimed nor proved damages arising from the breach of the contract, nor from being prevented from performing it. On the contrary the cause of action was treated by the plaintiff and referee and by the court below as one where property bargained for had been delivered and title vested in the purchaser, and for which therefore, the plaintiff within well-settled rules of law, might maintain the action and recover the purchase-price. And such is the contention of the learned counsel for the respondent upon this appeal. There is, however, nothing in the evidence to warrant that view of the case, or permit the application of such rule of law.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

NIGHTINGALE ET AL. v. EISEMAN ET AL.

(121 New York, 288.—1890.)

ACTION for goods sold and delivered. Judgment for defendants was sustained by the General Term of the Supreme Court.

EARL, J. On the 4th day of January, 1886, the plaintiffs were manufacturers of silk, at Paterson, New Jersey, and the defendants were dealers in silk, doing business in the city of New York. On that day, an agent of the plaintiffs, who was engaged in selling silk for them on a salary, called upon the defendants at their place of business and took from them the following order:

"Order No. 11. *January* 4th, 1886.
Ship by Ex. EISEMAN & Co.,
Bill Mach. Grand St., City.
Duplicate No.
Term, 6–10 1 per cent special.

Delivery { 25 pcs., Feb. 20.
50 " Mch. 1st.
Balance before Mch. 15, or earlier if possible.

No. 756. 100 *pcs.*, 19 in. Surah, @ 60 c."

Then follows a statement of the colors of the different pieces to be furnished. It was proved that the figures 6, 10, 1, following the word "Term," meant six per cent off from the bill for the silk, one per cent extra discount, and the silk to be paid for ten days after delivery. The order having been sent to the plaintiffs by their agent, on the next day they wrote to the defendants that they had received their order and would endeavor to forward the goods "as near as possible to the time specified." About the thirteenth of March, they shipped from Paterson, to the defendants at New York, seventeen pieces of the silk, and never, thereafter, shipped any more; and they commenced this action on the thirteenth of April thereafter to recover the contract-price of the silk delivered. The defendants refused payment before the action was commenced and defended the action on the ground that the plaintiffs had not performed their contract.

If we assume that the contract, as made by the plaintiffs' agent, is to be considered modified by their letter to the defendants, so that they were bound to deliver the silk only as near as possible to the time specified in the contract, yet in any event the contract bound them to deliver at some time. If the circumstances were such as to excuse the plaintiffs from delivery at the time specified in the contract, yet they were bound to deliver, and they could perform their contract only by delivering the silk at some time. We are inclined to the opinion that the contract should be treated as an entire contract to deliver the one hundred pieces, and that none of the silk was to be paid for until ten days after the delivery of the whole. But, if such be not its proper construction, and the defendants were bound to pay for each of the installments of silk specified in the contract within ten days after the delivery thereof, the plaintiffs were bound to make at least one complete delivery before they could call upon the defendants for any payment. The defendants, in no way, so far as the evidence discloses, waived complete performance. The seventeen pieces of silk were shipped to them from Paterson. They had no reason to suppose that the plaintiffs intended that shipment as a compliance with their contract to ship twenty-five pieces; and so, when they received the seventeen pieces, they had the right to suppose that they would be followed by a further shipment, and that the plaintiffs would continue to perform their contract. They could, therefore, re-

ceive the seventeen pieces without waiving their right to demand further performance before they could be compelled to pay. At the very first time when they were called upon to speak, that is, when they were asked to pay for the seventeen pieces, they refused payment on the express ground that the plaintiffs had not performed their contract, and promised that they would pay when the balance of the silk was received, and not before.

Therefore, whether we regard this as a single contract by which the plaintiffs were bound to deliver one hundred pieces of silk before they could demand any payment, or whether we consider the defendants bound to pay for each delivery specified in the contract, we think the plaintiffs are not entitled to recover; and for this conclusion the authorities in this state are so abundant that they need not be cited.

At the trial the counsel for the plaintiffs asked one of their witnesses, the agent who took the order from the defendants, the following questions: "After you took this order did you have any conversation with the defendants, or either of them, with respect to the delivery of any of the goods under this contract?" "After the taking of that order what conversation did you have with the defendants in regard to the delivery of the first installment of pieces referred to in the contract?" These questions were objected to on the part of the defendants as immaterial, and were excluded by the court. The counsel did not disclose what he expected to prove by these questions, and it is impossible to discover what competent evidence could have been elicited by them. No claim was made at the trial that the contract had in any way been changed; and the court, therefore, committed no error in excluding the questions.

One of the plaintiffs, as a witness, was asked the following questions by his counsel: "State whether or not, but for the strike of the laborers employed in your mill, you would have been able to deliver the goods ordered by the defendants at the time stated in the order, or within a reasonable time thereafter?" "State whether or not the strike of the laborers interfered with the delivery of a portion of the goods ordered by the defendants at the time named in the order given by them?" These questions were objected to by defendants' counsel as incompetent and immaterial, and were excluded. No complaint was made at the trial that the plaintiffs did not deliver the seventeen pieces of silk in time. The sole complaint was that they

did not deliver even the twenty-five pieces required for the first installment; and any evidence which could have been elicited by these questions could show no justification for a failure to make such delivery at some time before the action was commenced, and, therefore, the questions were properly excluded.

The judgment is clearly right, and should be affirmed.

All concur.

Judgment affirmed.

Bement v. Smith.

(15 Wendell, 493.—1836.)

Action of *assumpsit.*

In March, 1834, the defendant employed the plaintiff, a carriage-maker, to build a sulky for him, and promised to pay $80.00 for it. In June, 1834, the plaintiff took the sulky to the residence of the defendant, and told him that he delivered it to him, and demanded payment. The defendant denied having agreed to receive the sulky. Whereupon the plaintiff told him he would leave it with a Mr. De Wolf, residing in the neighborhood; which he accordingly did, and in July, 1834, commenced this suit. The declaration contained three special counts, substantially alike, setting forth the contract, alleging performance on the part of the plaintiff, by a *delivery* of the sulky, and stating a refusal to perform, on the part of the defendant. The declaration also contained a general count for work and labor and goods sold. The judge, after denying a motion for a nonsuit, made on the assumed grounds of variance between the declaration and proof, charged the jury, that the *tender* of the sulky was substantially a fulfilment of the contract on the part of the plaintiff, and that he was entitled to sustain his action for the *price* agreed upon between the parties. The defendant's counsel requested the judge to charge the jury, that the measure of damages was not the value of the sulky, but only the expense of taking it to the residence of the defendant, delay, loss of sale, etc. The judge declined so to charge, and repeated the instruction, that the value of the article was the measure of damages. The jury found for the plain-

tiff, with $83.26 damages. The defendant moved for a new trial.

By the Court, SAVAGE, Ch. J. The defendant presents no defense upon the merits. His defense is entirely technical, and raises two questions: 1. Whether the tender of the sulky was equivalent to a delivery, and sustained the averment in the declaration that the sulky was delivered; and 2. Whether the rule of damages should be the value of the sulky, or the particular damages to be proved, resulting from the breach of the contract. There is no question raised here upon the statute of frauds. The contract is therefore admitted to be a valid one; and relating to something not *in solido* at the time of the contract, there is no question of its validity.

The plaintiff agreed to make and deliver the article in question at a particular time and place, and the defendant agreed to pay for it, on delivery, in a particular manner. The plaintiff made, and as far as was in his power, delivered the sulky. He offered it to the defendant at the place and within the time agreed upon. It was not the plaintiff's fault that the delivery was not complete; that was the fault of the defendant. There are many cases in which an offer to perform an executory contract is tantamount to a performance. This I apprehend is one of them. The case of *Towers* v. *Osborne*, Strange, 506, was like this. The question here presented was not raised, but the defendant there sought to screen himself under the statute of frauds. The defendant bespoke a chariot, and when it was made, refused to take it; so far the cases are parallel. In an action for the value, it was objected that the contract was not binding, there being no note in writing nor earnest, nor delivery. The objection was overruled. In that case the action was brought *for the value;* not for damages for the breach of contract. This case is like it in that particular; this action is brought *for the value*, that is, for the price agreed on—and it is shown that the sulky was of that value. The case of *Crookshank* v. *Burrell*, 18 Johns. R. 58, was an action in which the plaintiff declared against the defendant on a contract whereby the plaintiff was to make the wood-work of a wagon, for which the defendant was to pay in lambs. The defendant was to come for the wagon. The question was upon the statute of frauds. Spencer, Ch. J., states what had been held in some of the Eng-

lish cases, 4 Burr. 2101, and 7 T. R. 14, that a distinction existed between a contract to sell goods then in existence, and an agreement for a thing not yet made. The latter is not a contract for the sale and purchase of goods, but a contract for work and labor merely. The case of *Crookshank* v. *Burrell* is much like this, with this exception: there the purchaser was to send for the wagon; here the manufacturer was to take it to him. There it was held that the manufacturer was entitled to recover, on proving that he had made the wagon according to contract: here it is proved that the sulky was made and taken to the place of delivery according to contract. The merits of the two cases are the same. It seems to be conceded that an averment of a tender of the sulky by the plaintiff, and a refusal of the defendant to receive it, would have been sufficient; and if so, it seems rather technical to turn the plaintiff out of court, when he has proved all that would have been required of him to sustain his action. The plaintiff, in his special counts, does not declare for the sale and delivery, but upon the special contract; and herein this case is distinguishable from several cases cited on the part of the defendant, and shows that it was not necessary to have declared for goods *bargained and sold*. It seems to me, therefore, that the judge was right in refusing the nonsuit, and in holding that the evidence showed substantially a fulfilment of the contract. The variance as to the amount of Joseph Bement's note, I think, is immaterial; but if otherwise, it may be amended. The alleged variance as to the price of the sulky is not sustained by the facts of the case.

The only remaining question, therefore, is as to the damages which the plaintiff was entitled to recover. It is true that the plaintiff does not recover directly as for goods sold; but in the case of *Towers* v. *Osborne*, the plaintiff recovered the value of the chariot, and in *Crookshank* v. *Burrell*, the recovery was for the value of the wagon. The amount of damages which ought to be recovered was not the question before the court in either of those cases; but if the value of the article was not the true measure, we may infer that the point would have been raised. Upon principle, I may ask what should be the rule? A mechanic makes an article to order, and the customer refuses to receive it, is it not right and just that the mechanic should be paid the price agreed upon, and the customer left to dispose of the article as he may? A contrary rule might be found a

great embarrassment to trade. The mechanic or merchant, upon a valid contract of sale, may, after refusal to receive, sell the article to another, and sue for the difference between the contract price and the actual sale. *Sands & Crump* v. *Taylor & Lovett*, 5 Johns. R. 395, 410, 411; 1 Salkeld, 113; 6 Modern, 162. In the first of these cases, the plaintiffs sold the defendants a cargo of wheat. The defendants received part, but refused to receive the remainder. The plaintiffs tendered the remainder, and gave notice that unless it was received and paid for, it would be sold at auction, and the defendants held responsible for any deficiency in the amount of sales. It was held, upon this part of the case, that the subsequent sale of the residue was not a waiver of the contract, the vendor being at liberty to dispose of it *bona fide*, in consequence of the refusal of the purchaser to accept the wheat. This case shows that where there has been a valid contract of sale, the vendor is entitled to the full price, whether the vendee receive the goods or not. I cannot see why the same principle is not applicable in this case. Here was a valid contract to make and deliver the sulky. The plaintiff performed the contract on his part. The defendant refused to receive the sulky. The plaintiff might, upon notice, have sold the sulky at auction, and if it sold for less than $80.00, the defendant must have paid the balance. The reason given by Kent, Ch. J., 5 Johns. R. 411, is, that it would be unreasonable to oblige him to let the article perish on his hands, and run the risk of the insolvency of the buyer. But if after tender or notice, whichever may be necessary, the vendor chooses to run that risk and permit the article to perish, or, as in this case, if he deposit it with a third person for the use of the vendee, he certainly must have a right to do so, and prosecute for the whole price. Suppose a tailor makes a garment, or a shoemaker a pair of shoes, to order, and performs his part of the contract—is he not entitled to the price of the article furnished? I think he is, and that the plaintiff in this case was entitled to his verdict.

The question upon the action being prematurely brought before the expiration of the credit which was to have been given, cannot properly arise in this case, as the plaintiff recovers upon the special contract, and not upon a count for goods sold and delivered.

New trial denied.

CAHEN v. PLATT ET AL.

(69 New York, 348.—1877.)

AT the trial, verdict was rendered in favor of the plaintiff. The General Term of the Superior Court of the city of New York affirmed the judgment, from which the defendants now appeal.

EARL, J. In September, 1872, at the city of New York, the plaintiffs sold to the defendants 10,000 boxes of glass, at seven and one-half per cent. discount from the tariff price of July, 1872, to be paid for in gold, at New York upon delivery of invoice and bill of lading, by bills of exchange on Antwerp. The glass was to be of approved standard qualities, and was to be shipped on board of sailing vessels at Antwerp, and to be at the risk of the defendants as soon as shipped, and they were to insure and pay the freight and custom duties. The glass was to be delivered during the months of October, November and December, 1872, and January, 1873. In pursuance of this contract, the plaintiff delivered to the defendants 4,924 boxes of glass, for which they paid. They refused to receive any more, and this action was brought to recover damages consequent upon such refusal.

The defendants claimed, and gave evidence tending to prove, that the glass delivered was not of approved standard quality, and hence that they had the right to refuse to take the balance.

While some months after the glass was delivered the defendants complained of its quality, they at no time offered to return it, or gave plaintiff notice to retake it. They received it under the contract, and it is not important in this action to determine, as no counterclaim is set up, whether or not a right of action for damages on account of the inferior quality of the glass survived the acceptance. The fact that the glass delivered and received upon the contract was inferior, did not give them the right to repudiate the contract altogether. They could demand better glass, and when the plaintiff offered to deliver the balance, if it was inferior, they could refuse to accept it. But if plaintiff was ready and willing to deliver for the balance such glass as the contract called for, they were bound to receive it. Here

the plaintiff requested them to take the balance of the glass, and they refused to take any more, and thus repudiated and put an end to the contract. There was no proof that the plaintiff insisted upon delivering inferior glass, or that he was not ready and willing to deliver glass of the proper quality. They did not take the position that they were willing to receive glass of approved standard quality, but refused to take any more glass under the contract. There was, therefore, such a breach of contract as enabled the plaintiff to recover such legal damages as he sustained by the breach.

The only other question to be considered is whether a proper rule of damages was laid down by the court at the trial.

The contract was made in New York, and it was doubtless contemplated by the parties that the glass would be carried to New York. But the plaintiff was not bound to deliver it there. His delivery was upon shipboard at Antwerp, and after the glass was shipped the defendants could transport it to any part of the world. It was then at their risk, and they were liable to pay for it, although it should be lost. After plaintiff had shipped the glass, all he was bound further to do, to entitle him to payment, was to present to the defendants at New York the invoices and bills of lading of the glass.

Here the balance of the glass was not actually delivered. The defendants notified plaintiff not to ship, and absolutely refused to take any more, and hence the glass remained in Belgium. The general measure of damages in such a case is the difference between the contract price and the market price at the time and place of delivery. This measure is adopted as one that will generally give complete indemnity to the seller. He can dispose of the commodity contracted to be sold at the market price, and his damage will be the difference between the price thus obtained and the price he would have received if the contract had been performed. Evidence as to the price need not be confined to the precise time when the contract was to have been performed. It may sometimes be impracticable to show the price at the precise time, and hence evidence of the price for a brief period before and after the time may be given, not for the purpose of establishing a market price at any other time, but for the purpose of showing as well as practicable the market price on the day the contract was to have been performed. So it may not always be practicable to show the price

at the precise place of delivery. There may have been no sales of the commodity there, and hence evidence of the price at places not distant, or in other controlling markets may be given, not for the purpose of establishing a market price at any other place, but for the purpose of showing the market price at the place of delivery. (*Dana* v. *Fiedler*, 12 N. Y. 40; *Dustan* v. *McAndrew*, 44 N. Y. 72; *Durst* v. *Burton*, 47 N. Y. 167.) Here there was no difficulty. There was a market price at the place of delivery. The defendants proved that the market price there was thirty-seven and one-half per cent. off from the tariff rate, and the plaintiff proved that the market price in New York was fifty per cent. off. The court charged the jury that the plaintiff was entitled to recover the difference between the contract price and the market price in the city of New York, and this charge gave the plaintiff several thousand dollars more than he could upon the evidence have recovered if the court had charged that the market price at Antwerp should be taken instead of that at New York. In this charge, which was properly excepted to, the court erred, and for this error the judgment must be reversed and new trial granted, costs to abide event.

All concur.

Judgment reversed.

DUSTAN v. MCANDREW ET AL.

(44 New York, 72.—1870.)

ACTION for breach of contract, for refusal to take a quantity of hops according to contract. At the trial it was shown that the hops in all respects answered the contract.

On August 24, 1860, J. S. & W. Brown of New York executed the following agreement with the plaintiff:

"In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, we have sold this day to Mr. John F. Dustan, of this city, 100,000 pounds of first sort western or eastern hops, as we may select; growth of 1860; deliverable in the city of New York, at our option, during the months of October or November, 1860, at seventeen cents per pound, subject to Mr. J. S. Brown's inspection, or other mu-

tually satisfactory. Terms, cash on delivery. Mr. Dustan's name to be made satisfactory either by indorsement or by a deposit of $2,500 by both parties.

"J. S. & W. BROWN."

On the 7th of September, plaintiff sold this contract to defendants under the following agreement in writing:

"In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, I have this day sold to McAndrew & Wann the contract of J. S. & W. Brown, dated 24th August, 1860, for 100,000 pounds first sort hops, western or eastern, growth of 1860; upon condition that the said McAndrew & Wann fulfill the conditions of said contract to the said J. S. & W. Brown, and pay to me, in addition, on delivery of the hops, ten and one-half cents per pound.

"JOHN F. DUSTAN."

Prior to November 30, John S. Brown inspected and branded the hops and certified that they conformed to the contract. On November 30, J. S. & W. Brown were ready and willing to deliver said hops, and defendants were so notified, but refused to take them, because they had not had an opportunity to inspect them, and because J. S. & W. Brown had refused to let defendants' inspector inspect the hops. On December 24, plaintiff took and paid for the hops, and immediately notified the defendants the same were in store for them at No. 4 Bridge street; that unless they complied with the terms of the contract of the 7th of September on or before December 26, they would sell the same on their account and hold them for any deficiency. Defendants still declining to take the hops, they were sold at fair sale for twenty cents per pound.

Verdict was directed for plaintiff for $8,130 and was sustained by the General Term of the Superior Court of the city of New York, and defendants appealed to this court.

EARL, C. The contract required that the hops should be inspected by J. S. Brown, or some other inspector satisfactory to both parties. In case J. S. Brown could not, or should not inspect them for any reason, then they were to be inspected by some other person mutually satisfactory. Neither party had the right to demand any other inspector, unless Brown neglected

or refused to inspect. It is doubtless unusual to insert a stipulation in contracts, that the vendor shall inspect the goods sold. But where parties agree to this, they must be bound by their contract, and it must be construed the same as if some other person had been chosen inspector.

It is claimed on the part of the respondent, and was held by the court below, that the inspection provided for was intended simply for the convenience of the vendors, to enable them to perform their contract, and that it merely furnished *prima facie* evidence that the hops answered the contract, and that the inspection was not conclusive upon the parties. I cannot assent to this. The contract was for the sale and purchase of hops of a certain description, and the object of the inspection was to determine for the benefit of both parties, whether they answered that description. Until the vendors delivered the hops with the inspection, the vendee was not obliged to pay, and when so delivered, the vendors were entitled to the purchase price. The inspection was thus as much for the convenience and benefit of one party as the other. Its purpose, like similar provisions in a variety of contracts, was to prevent dispute and litigation at, and after performance. But if the inspection was merely for the convenience of the vendors, then they could dispense with it, and compel the vendees to take the hops without any inspection whatever. And if it was merely *prima facie* evidence of the quality of the hops, then it was an idle ceremony, because, not being binding, the vendee could still dispute the quality of the hops, refuse to take them, and show, if he could, when sued for not taking them, that they did not answer the requirements of the contract; and thus the plain purpose for which the provision was inserted in the contract would be entirely defeated.

The inspection could be assailed for fraud, or bad faith in making it, and perhaps within the case of *McMahon* v. *The New York & Erie Railroad Co.*, 20 N. Y. 463, because made without notice to the vendee. The inspection here was made without notice; but it is not necessary to determine whether this renders it invalid, as no such defense was intimated in the answer or upon the trial.

By the purchase of the contract the defendants were substituted, as to its performance, in the place of the vendee therein named, and were bound to do all that he had agreed to do or was bound in law to do. When notified that the hops were

ready for delivery they declined to take them, upon the sole ground that they had not had an opportunity to examine or inspect them; and they claimed that they had sent one Smith to inspect them, and that he had been declined permission to inspect them. There was no proof, however, that they ever tried to examine or inspect the hops, or that the vendors ever refused to permit them to examine or inspect them. They sent Smith to inspect them, and he went to one of the several storehouses where some of the hops were stored, and he says he was there refused an opportunity to inspect them by Mr. A. A. Brown. But there is no proof that he was in any way connected with the vendor, or that he had any agency or authority whatever from them. There was no proof that defendants ever tried with the vendors to agree upon any other inspector, or that they ever asked the vendors to have the hops inspected by any other inspector, and they made no complaint at any time that they were inspected without notice to them. The point that they should have had notice of the inspection was not taken in the motion for a nonsuit, nor in any of the requests to the court to charge the jury. If the point had been taken in the answer or on the trial, the plaintiff might, perhaps, have shown that notice was given by the vendors, or that it was waived.

Hence we must hold, upon the case as presented to us, that there was no default on the part of the plaintiff or the vendors, and that the defendants were in default in not taking and paying for the hops. The only other question to be considered is, whether the court erred in the rule of damages adopted in ordering the verdict.

The court decided that the plaintiff was entitled to recover the difference between the contract price and the price obtained by the plaintiff upon the resale of the hops, and refused, upon the request of the defendants, to submit to the jury the question as to the market value of the hops on or about the 30th day of November.

The vendor of personal property in a suit against the vendee for not taking and paying for the property, has the choice ordinarily of either one of three methods to indemnify himself. (1). He may store or retain the property for the vendee, and sue him for the entire purchase price. (2). He may sell the property, acting as the agent for this purpose of the vendee,

and recover the difference between the contract price and the price obtained on such resale; or (3). He may keep the property as his own, and recover the difference between the market price at the time and place of delivery, and the contract price. (2 Parsons on Con. 484; Sedgwick on Dams. 282; *Lewis* v. *Greider*, 49 Barb. 606; *Pollen* v. *LeRoy*, 30 N. Y. 549.) In this case the plaintiff chose and the court applied the second rule above mentioned. In such case, the vendor is treated as the agent of the vendee to make the sale, and all that is required of him is, that he should act with reasonable care and diligence, and in good faith. He should make the sale without unnecessary delay, but he must be the judge as to the time and place of sale, provided he act in good faith and with reasonable care and diligence. Here it is conceded that the sale was fairly made; it was made in the city of New York, in less than one month from the time the defendants refused to take the hops. It was not claimed on the trial that the delay was unreasonable and we can find nothing in the case to authorize us to hold that it was unjustifiable. We are, therefore, of the opinion, that the court did not err as to the rule of damages.

The judgment should therefore be affirmed with costs.

For affirmance, LOTT, Ch. C., EARL and HUNT, CC. GRAY, C., was for reversal, on the ground that the delay in selling was too great.

LEONARD, C., did not vote.

Judgment affirmed with costs.

VAN BROCKLEN v. SMEALLIE.

(140 New York, 70.—1893.)

ACTION for breach of contract.

FINCH, J. The only question in this case is one of damages. The plaintiff and defendant entered into a written agreement whereby the former agreed to sell and convey, and the latter to purchase and receive, the plaintiff's undivided one-third interest in the partnership of Snyder, Van Brocklen, and Hull, whose assets consisted of real estate held as partnership prop-

erty for the use of the business, stock on hand, and debts due or to become due; and who were manufacturers of knit goods, occupying their mill for that purpose. The contract was dated February 21st, 1891; the price to be paid was ten thousand dollars; and the formal instruments of sale were to be delivered and the price to be paid on or before the ensuing first of March. The partnership interest of the plaintiff was personal property (*Menagh* v. *Whitwell*, 52 N. Y. 146; *Morss* v. *Gleason*, 64 id. 204); and the title passed at once upon the execution of the agreement, for it is the general rule that a mere contract for the sale of goods, where the subject is identified and nothing remains to be done by the seller before making delivery, transfers the right of property, although the price has not been paid, nor the goods sold delivered to the purchaser. (*Bradley* v. *Wheeler*, 44 N. Y. 502.) On the morning of February 28th, which was three days after the sale, the defendant announced to his vendor his purpose to "throw up" the contract and to "drop it right there." He made no complaint as to its fairness or justice, no assertion of any deception or mistake, not even of any disappointment in his bargain, but merely said that he had partly promised to put some money into another enterprise and could not put it in both; that his brother was "kicking," and so he should not fulfill his agreement. Ordinarily, the vendee in default proffers some show of justification for his refusal to perform. This defendant had no excuse, but broke his contract because he chose to do so. The vendor, on the same day, served a written notice upon the vendee to the effect that he, the seller, was prepared to carry out the stipulations of the contract; that the papers on his part were executed and ready for delivery, and could be seen at the place where the exchange was to be made, and where they had been formally tendered to the vendee. As the first of March fell on Sunday, the notice offered performance on the day before or the day after, and insisted upon performance on the latter day at least. The defendant wholly disregarded the notice, and neglected and refused to fulfill his contract. On the second of April following the plaintiff gave a further written notice to the vendee that he had made diligent effort to sell the property since the latter's refusal to take it; that the best offer made was about $2,500 less than the contract price; that he was to give an answer by the next night; and that if he heard nothing to

the contrary he should accept the offer and hold the vendee for the resulting loss. The defendant paid no attention to this notice, made no objection, asked no delay, requested no different mode of disposition, suggested no purchaser willing to pay more, but simply remained silent. The plaintiff thereupon sold the one-third interest to his partners, Snyder and Hull, for $7,500, not requiring the cash, but taking $6,000 in notes and the balance in specific articles of property. There is no proof, no pretense, not even a suggestion in the record, that this sale was not perfectly fair and productive of the best price possible to be obtained.

On these facts the plaintiff sued, seeking to recover the deficiency on the re-sale. In answer to inquiries of the defendant, he testified that the interest contracted to be sold was worth $10,000 when the agreement was executed, and when it was to be performed, and such may have been its intrinsic worth, and yet its sale value may have been much less.

At the close of his case the defendant asked the court to rule as matter of law upon the facts, that the measure of damages was the difference between the value of the property at the date of the contract and the date of performance, and that since there was no such difference, the plaintiff was entitled only to nominal damages. The plaintiff objected to any such ruling, insisting that on the facts he was entitled to recover the deficiency on the re-sale. The court ruled that only nominal damages could be recovered, and directed a verdict for six cents, to which the plaintiff excepted. On appeal the General Term affirmed the judgment.

The ground of that affirmance is certainly erroneous. The rule of damages applied was that which pertains to sales of real property, and which differs in scope and in principle from that applicable to sales of personal property. The opinion describes the contract as one for "the purchase of land," and all the authorities cited relate to sales of real estate. They have no application to the case in hand. The plaintiff had no land to sell and did not contract to sell any. What he did bargain about was his ultimate interest in the partnership assets when converted into money and after payment of all debts. His share of the net surplus then remaining was the only subject of sale, and all that he contracted to sell. His vendee would not and could not become a partner by force of the purchase, would

gain no title to the assets as such, and could only force a sale of such assets, including the mill, and the distribution of the proceeds. It was said in *Tarbell* v. *West*, 86 N. Y. 287, that "it is now well settled that a purchaser from one partner of his interest in the partnership, acquires no title to any share of the partnership effects, but only his share of the surplus, after an accounting, and the adjustment of the partnership affairs." The courts below, therefore, proceeded on a wrong basis, which led them into error.

In this court the rule of damages for a breach by the buyer of a contract for the sale of personal property, is perfectly well settled. (*Dustan* v. *McAndrew*, 44 N. Y. 78; *Hayden* v. *Demets*, 53 id. 426.) In each of these cases it was ruled that the vendor of personal property has three remedies against the vendee in default. The seller may store the property for the buyer and sue for the purchase price; or may sell the property as agent for the vendee and recover any deficiency resulting; or may keep the property as his own and recover the difference between the contract price and the market price at the time and place of delivery. In the second of the decisions last cited, it was further held that the rule applied, not only to cases where the title passed at once, but also to cases where the contract was executory but there had been a valid tender and refusal. Where the second method is adopted and the vendor chooses to make a re-sale, that need not be at auction, unless such is the customary method of selling the sort of property in question, nor is it absolutely essential that notice of the time and place of sale should be given to the vendee. (*Pollen* v. *LeRoy*, 30 N. Y. 556.) Still, as the sale must be fair, and such as is likely to produce most nearly the full and fair value of the article, it is always wisest for the vendor to give notice of his intention to re-sell, and quite unsafe to omit it.

In this case the vendor acted strictly within the authority of our repeated decisions, and must be protected unless we are prepared, after misleading him, to reverse in some degree our own doctrine deliberately declared. What is now said is that we ought not to extend the vendor's right of re-sale to a species of personal property such as is involved in the contract before us. That is an erroneous and misleading statement of the problem. The adjudged rule covers every species of personal property. We have said of it that it is founded in good sense

and justice, and that it "is the same in all sales, and in respect to property of every description." (*Pollen* v. *LeRoy*, *supra.*) The rule, therefore, needs no extension since it already covers the present case; and the real suggestion is that we should begin for the first time to make exceptions to it, and here and now take out of its scope and operation the one specific sort of personal property which consists of an undivided interest in a partnership. I feel myself bound to resist strenuously, and to advise earnestly against, any such disintegrating exception, whose logical outcome will inevitably be to confuse the rule with narrow and arbitrary distinctions; to open it to attack in numerous directions; to make its operation fickle and uncertain; to breed needless litigation; and in the end to shatter the rule itself. In deference to the doubts of some of my brethren, I ought to state as briefly as possible a few of the reasons why I think no such exception should be made.

One such reason concerns the safety of the fundamental doctrine upon which the rule is founded, which does not admit of such an exception as is now proposed, and will itself be endangered by the resultant logic of the process. That doctrine is that the vendor of personal property has a lien, or something more than a lien, upon it for the purchase price, while it remains in his possession awaiting delivery, although the right of property has passed to the vendee. (Benjamin on Sales, book V., chap. 3, §§ 782, 783; Schouler on Personal Property, vol. 2, § 547.) The right of the unpaid vendor is deemed sometimes analogous to the pawnee's right of sale, and sometimes to the right of stoppage *in transitu*. Whatever it be, it is at least a lien upon the property sold for the purchase price so long as it remains undelivered, which lien the vendor may enforce by a sale, and then recover any balance of the contract price unrealized. Now, are we prepared to say that there is such a lien where the property is grain or hops, or a horse, but is not where it is an interest in a partnership? And upon what principle can we admit the lien and the consequent right to enforce it in one case and deny it in the other? If we undertake to make the distinction the inevitable result will be to shake or destroy the fundamental doctrine itself with consequences which we may easily see would be likely to prove disastrous?

But, again: Those who would draw the line between kinds or classes of property subject to re-sale, and those not so sub-

ject to it, must tell us where it is located, and upon what principle it is to be drawn. That, I suspect, would prove at least a difficult, if not an impossible task. The effort has been many times made, but always hitherto has ended in absolute failure. At first the endeavor was to limit the remedy to the case of perishable property, but in *MacLean* v. *Dunn*, 4 Bing. 722, that effort was resisted. Best, C. J., said of it: "It is admitted that perishable articles may be re-sold. It is difficult to say what may be considered as perishable articles and what not; but if articles are not perishable, *price is*, and may alter in a few days or a few hours. In that respect there is no difference between one commodity and another." "And," he added, "we are anxious to confirm a rule consistent with convenience and law. . . . The goods may become worse the longer they are kept; and, at all events, there is the risk of the price becoming lower." And so the rule was not confined merely to perishable property.

Another line of distinction is that between goods and merchandise and things in action; but we are not at liberty to draw that line in this state, even if it were possible to do it upon any logical ground. In *Porter* v. *Wormser*, 94 N. Y. 442, the contract was for the sale of government bonds, and in denying the right of the vendor to re-sell, Judge Andrews put it upon the ground that the vendee was not in default, adding: "The contract to carry had not expired, and the sale cannot be regarded as the exercise by a vendor of personal property, of a right to re-sell on account of the vendee, and to charge the latter for the loss, for the plain reason that such right in any given case does not come into existence, and can be exercised only after default by the vendee." There was no suggestion that the rule did not apply to things in action, and he cited *Dustan* v. *McAndrew*, *supra*, and *Mason* v. *Decker*, 72 N. Y. 595.

The latter case shuts off another possible ground of distinction which might be that the rule only applies to such personal property as is the subject of general traffic, and has a market value. In that case, the thing sold was shares of the stock of a construction company which was badly in want of funds, and struggling, by an issue of bonds to its friends, to procure means to live. This court held that the vendor had a double remedy, and might, as one of them, re-sell the stock after tender to the vendee in default, and recover the resultant loss. So that the

rule not only covers things in action, but also those which are not the subject of general dealing, and cannot be said to have a market value.

This last case, in principle, comes very near to the one at bar. The interest of a stockholder in the corporate property represented by his stock is nothing more than a *pro rata* share in the property of the company remaining after the payment of debts and expenses, with the intermediate right to share in the profits. (*Burrall* v. *Bushwick R. R. Co.*, 75 N. Y. 216.) That is exactly the description of the interest of a partner in a partnership. That one is incorporated and the other not is the sole difference between them without at all affecting the common and identical character of the property owned in each. It seems to me the case must be decisive.

But I draw another inference from it, and that is the wide and dangerous sweep of the doctrine contended for in its application to stock transactions. I suppose nothing to be more common than sales of stocks by vendors for account of a defaulting vendee and a recovery of the balance unrealized. Logically that must stop if the exception here contended for be allowed, for I take it that none of us, however astute, can stand upon so thin a distinction in the doctrine under consideration as that between a corporate and non-corporate interest in capital and assets.

I may be permitted to add that I can see no injustice in the application of this rule to the present case. Beyond any question the defendant could have been sued for the whole purchase price, and if solvent could have been made to pay the entire $10,000. If he deemed the re-sale for $7,500 less than could be or ought to be realized, he had the privilege of protecting himself by procuring a more liberal purchaser or taking the property and controlling its sale for himself. He did neither. He kept silent. He defiantly broke his contract and with some natural triumph stands ready to pay the six cents. That is not enough. He should pay the deficiency resulting from the sale.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except ANDREWS, Ch. J., not voting.

Judgment reversed.[1]

[1] See University Law Review, I, 135.

WINDMULLER ET AL. v. POPE ET AL.

(107 New York, 674.—1887.)

IN January, 1880, plaintiffs agreed to sell and defendants to buy "about twelve hundred tons old iron, . . . , for shipment from Europe at sellers' option, by sail or steam vessels to New York, Philadelphia or Baltimore, at any time from May 1 to July 15, 1880, at thirty-five dollars per ton, . . . deliverable in vessels at either of the above ports on arrival." On June 12, 1880, defendants notified plaintiffs that they would not receive or pay for the iron, and that they must not ship any to them. Plaintiffs thereupon sold said iron abroad.

(*Extract from opinion.*) We think no error is presented upon the record which requires a reversal of the judgment. The defendants having on the 12th of June, 1880, notified the plaintiffs that they would not receive the iron rails or pay for them, and having informed them on the next day that if they brought the iron to New York they would do so at their own peril, and advised them that they had better stop at once attempting to carry out the contract, so as to make the loss as small as possible, the plaintiffs were justified in treating the contract as broken by the defendant at that time, and were entitled to bring the action immediately for the breach, without tendering the delivery of the iron, or awaiting the expiration of the period of performance fixed by the contract; nor could the defendants retract their renunciation of the contract after the plaintiffs had acted upon it and, by a sale of the iron to other parties, changed their position. (*Dillon* v. *Anderson*, 43 N. Y. 231; *Howard* v. *Daly*, 61 id. 362; *Ferris* v. *Spooner*, 102 id. 12; *Hochster* v. *De La Tour*, 2 El. & Bl. 678; *Cort* v. *Ambergate, etc., Railway Co.*, 17 Ad. & El. 127; *Crabtree* v. *Messermoth*, 19 Ia. 179; Benjamin on Sales, §§ 567, 568.)

The ordinary rule of damages in an action by a vendor of goods and chattels, for a refusal by the vendee to accept and pay for them, is the difference between the contract-price and the market value of the property at the time and place of delivery. (*Dana* v. *Fiedler*, 12 N. Y. 40; *Dustan* v. *McAndrew*, 44 id. 72; *Cahen* v. *Platt*, 69 id. 348.)

All concur.

Judgment affirmed.

CANDA ET AL. v. WICK.

(100 New York, 127.—1885.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of plaintiffs, entered upon the report of a referee.

On Sept. 13, 1881, the plaintiffs agreed to sell and deliver 400,000 brick to the defendant, to be delivered on the street in front of premises upon which the defendant was erecting a building. The defendant agreed to accept and pay for the brick at the rate of $7.25 per thousand. On Sept. 21st, the plaintiffs delivered 2,000 brick, when defendant prevented further delivery, although plaintiffs offered to perform the contract on their part. The market value of the brick was then $6.75 per thousand. There was no tender of any brick after that date. On Oct. 14th, defendant demanded the remainder of the brick, but plaintiffs refused to deliver. The market value of the brick was then $8.25 per thousand. The referee allowed as damages the difference between the contract price and the market price on Sept. 21st.

ANDREWS, J. The referee found, upon sufficient evidence to justify the finding, that the reasons assigned by the defendant on the 21st of September, 1881, for refusing to receive the balance of the brick of the cargo of the schooner *Ellen*, were groundless. He further found that the brick were of the quality specified in the contract, and that there was a sufficient available space for piling them. Upon the defendant's refusal to permit the plaintiffs' cartmen to continue the delivery, the plaintiffs offered to deliver the balance of the cargo, and stated to the defendant that if brick advanced in price, they could not be held responsible for the delivery on the contract. The defendant persisted in his refusal to receive any more brick from the cargo of the *Ellen*, assigning the reasons before stated, viz.: defective quality and want of space. The plaintiffs had a right to make delivery on the contract, on the 21st of September. The written memorandum is silent as to the time of delivery, but the evidence shows that prompt delivery and acceptance was contemplated, and that this was one of the considerations

upon which the plaintiffs entered into the contract. The tender and refusal constituted, we think, a breach of the contract by the defendant. It was not necessary that the plaintiffs should tender the whole four hundred thousand brick in order to put the defendant in default. It was not contemplated that the entire number should be delivered in one mass, but as is evident from the situation of the parties and the surroundings, they were to be delivered from time to time, at the convenience of the plaintiffs, but without delaying the defendant in prosecuting the work in which they were to be used. When the defendant refused without adequate reason to accept the cargo of the *Ellen*, the plaintiffs were at liberty to treat the contract as broken, and were not bound to make an actual tender of the remainder of the brick before bringing the action. This would have been a useless ceremony. The warning given by the plaintiffs to the defendant, that his refusal would absolve them from any obligation on the contract, was not, as is claimed, equivalent to an assertion of a right on their part to regard the contract as still subsisting and executory, or as a reservation of a right to deliver the brick if they should so elect. The letter of October 4, 1881, shows that on several occasions after the 21st of September, the plaintiffs were willing to go on with the contract, but the defendant was not ready and only became ready when brick had greatly advanced in price. The right of action having accrued from the transaction of September 21st, it was not waived as matter of law by a subsequent offer on the part of the plaintiffs to furnish the brick, which was not accepted by the defendant until the advance in the market had materially changed the situation. The price which the plaintiffs received for the brick on sale to other parties was immaterial in view of the facts that they were delivered on contracts made prior to September 21st, and that the plaintiffs had the ability to furnish all the brick required for all their contracts, including that with the defendant.

The judgment should be affirmed.

All concur.

Judgment affirmed.

KELLER ET AL. v. STRASBURGER.

(90 New York, 379.—1882.)

A VERDICT was rendered in favor of the defendant, and judgment entered thereon was affirmed by the General Term of the Supreme Court.

EARL, J. This action was brought for goods sold and delivered, the complaint containing no allegation of fraud. The defendant in his answer alleged that the goods were bought upon a credit of four months, and that the credit had not expired at the commencement of the action. Upon the trial the defendant proved his allegation as to the credit, and then the plaintiffs gave evidence, which was controverted by the defendant, tending to show that at the time of the purchase, and to induce the credit, the defendant made false representations as to his solvency. The plaintiffs also proved that before the expiration of the credit, and before the commencement of the action, the defendant gave them notice that he would not be able to pay for the goods at the expiration of the credit. The plaintiffs claim that this notice was a waiver of the credit, that it destroyed the mutuality of the contract, and that they could, in consequence thereof, at once commence this action without waiting for the expiration of the credit. This is a novel claim, unsupported by any authority. The contract was not repudiated by the defendant, and remained in force notwithstanding his declared inability to perform it on his part.

* * * * * * * *

All concur.

Judgment affirmed.

Arnold v. Delano.

(4 Cushing, 33.—1849.)

This was an action of trover, brought by the plaintiff as the assignee of Arthur Sowerby, an insolvent debtor, and was submitted to the court of common pleas upon the following agreed statement of facts:

On the 30th of March, 1848, Sowerby and one Grant, who were partners as silk manufacturers, in Northampton, purchased of Delano, the defendant, sixty-five cords of wood, then piled with a much larger quantity on Delano's land. The wood sold was measured off at the time of the sale, but no otherwise separated from the residue, than by means of a stake put down to designate the extent of sixty-five cords. The contract was made with Sowerby, and a bill of the wood was given him by Delano, as follows:

"Messrs. Sowerby & Grant. Bo't of C. Delano. 1848, March 30th. 65 cords wood, $97.00. Received payment by note at 6 mos. at Northampton Bank. C. Delano."

At the time of making the contract, there was no formal taking possession or delivery of the wood, except as above stated, but the purchasers were to remove the same before the 1st of April, 1849.

On the 29th of June, 1848, Sowerby applied personally for the benefit of the insolvent law, and a warrant was accordingly issued to Ansel Wright, as messenger, on the same day. Possession was taken of the property at the silk works, by the messenger, on the 30th of June, and a schedule of assets was furnished him by Sowerby on the same day. On the schedule was the following entry, in the handwriting of the messenger: "65 cords of wood on C. Delano's land." No formal possession was taken of the wood by the messenger; nor was any entry made by him on the land where it was piled, which was distant, in fact, two miles or more from the silk works. On the 15th of July, Sowerby furnished a schedule of creditors, on which was this entry: "Cornelius Delano, Northampton. Note. Wood. No security. $97."

On the evening of Saturday, the 1st of July, Delano, having heard of the insolvent proceedings, gave the messenger notice

that the wood had not been paid for, and that he claimed to hold it, until the price should be paid. Delano also saw Sowerby the same evening, and requested him to give up the bill and take the note. Sowerby took until the next Monday morning for consideration, and being then applied to, gave up the bill to Delano, who thereupon canceled the note. The first publication of notice of the insolvency did not take place until Monday afternoon.

On the 17th of June, 1848, Sowerby and Grant advertised a dissolution of partnership, and gave public notice that Sowerby was duly authorized to settle all accounts of the late firm. As a part of the terms of dissolution, Sowerby undertook to pay all the partnership debts, and Grant conveyed to him all his right and title in and to the partnership property; but this conveyance was not known to Delano. At the time of the dissolution, the partners, severally, as well as the partnership, were, in fact, deeply insolvent.

The plaintiff was appointed assignee of Sowerby in October, 1848; the first meeting of creditors having been continued on account of certain legal objections; and the assignment was then first made by the commissioner.

To the demand made by the assignee on Delano for the wood, Delano answered that he could have it whenever he paid for it; and Delano has always been willing to give up the wood upon payment of the price. Subsequent to the 1st of April, 1849, Delano sold a portion of the wood measured off; but there has always remained in the same lot more than sixty-five cords of similar quality, of which he has offered to give up that amount, upon payment of the price agreed upon.

Upon the foregoing statement of facts, the court of common pleas gave judgment for the plaintiff, whereupon the defendant appealed to this court.

SHAW, C. J. This is an action of trover, to recover the value of sixty-five cords of wood, brought by the plaintiff, as the assignee of Arthur Sowerby, an insolvent debtor. It is submitted to the court upon an agreed statement of facts, which being clearly stated, it is not necessary to recapitulate.

On these facts, the plaintiff contends, that there was a complete sale and purchase of the wood, by which the property became vested in Sowerby and Grant; that by the dissolution

of partnership between them in June, 1848, and the transfer by Grant to Sowerby of all his right, title and interest in the partnership property, Sowerby stipulating to pay all the partnership debts, this property became vested in Sowerby; and that by his subsequent insolvency, the proceedings under it, and the assignment to the plaintiff, the same title to the property became vested in him.

On the other hand the defendant insists, that though the wood was sold and measured off, with a license to the purchasers to come on to his land, and take it away as they wanted it, at any time within one year; and though a credit of six months was given for the purchase money, and a note was given to the plaintiff payable at the Northampton Bank in six months; yet as the wood remained as it originally lay on his premises, it was in his actual possession; and, as the purchasers became insolvent, and legal proceedings in insolvency were instituted against them, before the price of the wood had been paid, he had a right to detain the wood until payment or its equivalent.

The cause has been extremely well argued on both sides, and many authorities have been cited. But without going over the whole ground, it is proposed to state only what we understand to be the rules of law bearing upon the subject, and to apply them to the facts of the case as they appear in the agreed statement.

There is manifestly a marked distinction between those acts, which, as between the vendor and vendee upon a contract of sale, go to make a constructive delivery and to vest the property in the vendee, and that actual delivery by the vendor to the vendee, which puts an end to the right of the vendor to hold the goods as security for the price.

When goods are sold, and there is no stipulation for credit or time allowed for payment, the vendor has by the common law a lien for the price; in other words, he is not bound actually to part with the possession of the goods, without being paid for them. The term *lien* imports, that by the contract of sale, and a formal, symbolical or constructive delivery, the property has vested in the vendee; because no man can have a lien on his own goods. The very definition of a lien is, a right to hold goods, the property of another, in security for some debt, duty or other obligation. If the holder is the owner, the

right to retain is a right incident to the right of property; if he have had a lien, it is merged in the general property.

A lien for the price is incident to the contract of sale, when there is no stipulation therein to the contrary; because a man is not required to part with his goods, until he is paid for them. But *conventio legem vincit;* and when a credit is given by agreement, the vendee has a right to the custody and actual possession, on a promise to pay at a future time. He may then take the goods away, and into his own actual possession; and if he does so, the lien of the vendor is gone, it being a right incident to the possession.

But the law, in holding that a vendor, who has thus given credit for goods, waives his lien for the price, does so on one implied condition, which is, that the vendee shall keep his credit good. If, therefore, before payment, the vendee become bankrupt or insolvent, and the vendor still retains the custody of the goods, or any part of them; or if the goods are in the hands of a carrier, or middle-man, on their way to the vendee, and have not yet got into his actual possession, and the vendor, before they do so, can regain his actual possession, by a stoppage *in transitu;* then his lien is restored, and he may hold the goods as security for the price.

The principle we take to be well settled, but the difficulty which arises in practice,—one which has given rise to so many cases,—lies in determining what is such an actual change of possession from the vendor to the vendee, as shall be deemed to put an end to the vendor's lien. Some cases seem to be clear, and to illustrate the rule. If the goods are delivered to the vendee's own servant, agent, wagoner, or shipmaster, that is in law a delivery to the vendee himself. So if goods are stored in a common warehouse, as the dock warehouses at the London docks, and entered in the books as the property of A. B., and deliverable to him, and a dock warrant issued, and afterwards, upon the proper order of A. B. on the warrant, the whole or a part are transferred to C. D., and entered in like manner in his name, this is an actual change of custody, control and possession, though the goods are not moved from their position. So, if the seller sustain different characters, as if a person, who is a livery stable keeper, having a horse to sell, makes a sale to C. D., and then transfers the horse to his livery stable, to be kept for C. D. at a stipulated weekly hire, this

may be regarded as an actual change of custody and possession.

But by far the most common case which occurs, is where goods are ordered by letter, on credit, to be sent from one country to another, or from one part of the same country to another, and are accordingly forwarded by a common carrier. There, as the carrier is not the servant of the vendee, the goods, though they have left the actual possession of the vendor, if they have not reached the actual custody of the vendee, or the ultimate place of destination ordered by him, may be stopped *in transitu* by the vendor; and if he can thus stop them, he regains his lien.

Now to apply these rules to the present case: it appears to us very clear, that there was a good sale and delivery of the wood to Grant and Sowerby. The wood was measured and marked off, so that the very sticks composing the sixty-five cords could be identified. And the reason, why marking, measuring, weighing, etc., is necessary, is, that the particular goods may be identified. If ten barrels of oil are sold, lying in a tank of thirty barrels, the buyer can identify no part of it as his, until it is measured. So, if fifty bales of cotton are sold out of one hundred, no particular bales are identified until separation. But, if they are capable of being identified, and by the contract of sale are identified, that is sufficient, and the property passes; as, if in the last case, there are one hundred bales of cotton, numbered from one to one hundred, and the contract is for the fifty odd numbers, or the fifty even numbers, or any other specified fifty numbers, the bales sold are identified though not separated. In the present case, the wood was marked off and identified, and the vendees had a license for one year to come on to the vendor's land and to take it away. This was a complete sale and a constructive delivery, so as to vest the property in Grant and Sowerby; and, on their dissolution and transfer, it vested in Sowerby, and by the assignment in his assignee. Then, the question is, whether the defendant had, under the circumstances, a lien for the price, and we think he had.

The purchasers had a license to go on to the defendant's land, and take the wood; whether this license was revocable or not, it is not necessary to consider, as it was not in fact revoked. But the vendees did not enter and take the wood; it remained

on the vendor's land, and in his possession, in the same manner as before and at the time of the sale. The vendor acted in no new capacity; he was to receive nothing for keeping; he was precisely in the condition of a vendor, who had not parted with the possession and custody of the goods sold. And this was the state of things, when Sowerby went into insolvency; upon which event, we think, the vendor was remitted to his right to keep possession of the wood as security for the price. Such a vendor in possession is regarded as having a higher equity to retain for the price, than the assignee of a debtor, who has not paid for the property, has to claim it for the general creditors.

Sometimes a question may arise as to what constitutes an insolvency, and whether a mere stoppage of payment, and failure, in the popular sense, is sufficient. In this case, there is no doubt, because there was an insolvency declared by law, and a sequestration of all the vendee's property, under which this wood is claimed by the plaintiff.

If it might be supposed, that the giving of a note in this case was a payment, which would vary the case from that of a simple promise to pay for the wood, we think the answer is, that a promissory note, even if in form negotiable, whilst it remains in the hands of the vendor and not negotiated, but ready to be delivered up on the discharge of the lien, is regarded as the evidence in writing of a promise to pay for the goods purchased, and does not vary the rights of the parties. (*Thurston* v. *Blanchard*, 22 Pick. 18.)

The fact, that after the proceedings in insolvency commenced, and became known to the defendant, he applied to Sowerby and got up the bill of sale, cannot of itself, we think, avail the defendant. The insolvent could not, in that state, vacate the sale, or re-convey the property; and if the wood was worth more than the lien of the defendant upon it, we think that the assignee, on paying the defendant the price, was entitled to the wood for the benefit of the general creditors; and this was a right which the insolvent could not defeat.

A fact was stated, on the part of the plaintiff, as of some weight, namely, that after the expiration of one year from the sale, the defendant sold a part of the wood. Whether, at that time, he had an absolute right to sell the wood or not, it seems to us, that such sale can have no effect on this claim. The plaintiff, if he can recover at all, must recover on the strength of his

own title. He must prove a conversion. The action of trover admits that the defendant obtained the possession rightfully; then, if he had a lien and a right to hold until the price was paid, his refusal to deliver the wood on demand to the plaintiff, (such demand not being accompanied with a tender of the price,) was no evidence of conversion; and, until such tender made, the plaintiff has no ground of complaint.

Judgment for the defendant.

Babcock v. Bonnell.[1]

(80 New York, 244.—1880.)

Action by plaintiff as administratrix of Charles A. Babcock for an accounting of the proceeds of a policy of insurance on

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[1] History of Stoppage in Transit.—"In courts of equity it has been a received opinion that it was founded on some principle of common law. In courts of law it is just as much the practice to call it a principle of equity, which the common law has adopted. This was strongly insisted upon by Mr. Justice Buller, in his celebrated judgment in the House of Lords, in the case of *Lickbarrow* v. *Mason*, 4 Bro. P. C. 57. It has also been said by Lord Kenyon, that it was a principle of equity adopted by the common law to answer the purposes of justice. The most eminent equity lawyers that I have had the opportunity of conversing with in times that are gone by, were unanimous in repudiating it as the offspring of a court of equity. The first case that occurred upon this subject affords some authority for the opinion of Mr. Justice Buller and Lord Kenyon. It is the case of *Wiseman* v. *Vandeput*, 2 Vern. 203, in 1690. That was a bill filed by the assignees of the bankrupt against the vendor. The Lord Chancellor directed an action of trover to be brought by the plaintiffs, upon which they recovered a verdict. It is clear, therefore, that the rule had not at that time been adopted at law. The Lord Chancellor however adopted it in equity, and, notwithstanding the verdict at law for the plaintiffs, made a decree against them. The next case is that of *Snee* v. *Prescott*, 1 Atk. 24. Lord Hardwicke again applied the rule to a certain extent in equity. But it is remarkable that he received evidence of what was the custom of merchants on this point; and he expressly founds his decree upon the evidence of the custom of merchants, as well as upon the justice of the case. This decision occurred about the year 1742 or 1743. The next case is that of *Ex parte Wilkinson*, in 1755, referred to in *D'Aquila* v. *Lambert*, Ambler, 399, which took place in 1761. There the Lord Chancellor again grounded his decree on the usage of merchants, and stated that

the life of said intestate, less payments of premium, made by defendant, and interest thereon. Plaintiff had judgment below.

CHURCH, Ch. J. The finding of the trial judge that the policy was taken out and delivered to the defendant as collateral security for the payment of the indebtedness of Babcock & Co. to him was warranted by the evidence. No other conclusion could be arrived at, and the evidence is substantially undisputed.

Some years afterwards Mr. Babcock expressed a desire not to be regarded as having an interest, and stated that the entire interest was in the defendant; but I do not think that this expression, under the circumstances, would have the effect of

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the several previous decisions which had taken place to the same effect, had given great satisfaction to the merchants. Numerous cases have followed at law, showing that the right of stoppage *in transitu*, under certain circumstances, is now part of common law.

"Nevertheless, owing perhaps to the doubtful state of its parentage, many unsatisfactory and inconsistent attempts have been made to reduce it to some analogy with the principles which govern the law of contract, as it prevails in this country between vendor and vendee. It is to be observed, however, that the right of stoppage *in transitu* is not peculiar to the law of England. It existed, I believe, in the commercial states of Europe. The cases I have already referred to, show that it was practised in the Italian States. That it existed in Holland was proved in a case tried by Lord Loughborough, and mentioned by him in his judgment in the case of *Lickbarrow* v. *Mason*, 1 H. Bl. 364. That it is the law of Russia was also proved in the cases of *Inglis* v. *Usherwood*, 1 East, 515, and of *Bothlingk* v. *Inglis*, 3 East, 381. It appears also, on reference to the Chapitre de la Faillité, in the Code of Napoleon, that the law of France on this subject is in all points similar to our own. It is known that this celebrated code is chiefly a digest of the law of France as it existed before the Revolution. Indeed the right of stopping *in transitu* had, before the composition or digest of that code, acquired the name in the French law of 'Revendication.' It may, therefore, be presumed to be a part of the law of merchants which prevails generally on the continent. The proof of which, from time to time, combined with its manifest justice and utility, has at length introduced it into the common law of England, of which the law merchant properly understood has always been reckoned to form a part." Lord Abinger, C. B., in *Gibson* v. *Carruthers*, 8 Mees. & Wels. 321, 338–339.

The right of stoppage in transit is practically an extension of the right of lien which, by the common law, every vendor has upon goods, sold, but still in his possession, for the price. The exercise of the right does not rescind the sale or revest the title in the vendor. He simply regains possession, without ownership, and may pursue the same remedies to recover the price as though he had never exercised the right of stoppage.

a release, or create an *estoppel.* There is no dispute that at the time the policy was taken out, there was an indebtedness in favor of the defendant against Babcock & Co., evidenced by two notes, amounting to $4,678.48. The policy was issued in February, 1870, and it is claimed and found that in April, 1870, these notes were compromised and settled, and that the defendant received from one Wheelright, on behalf of Babcock & Co., $925 in money, in full satisfaction and discharge of said indebtedness, and delivered and surrendered said notes to him, and that they were afterwards delivered up to Babcock & Co., who destroyed and canceled them. Wheelright testified that he purchased the notes of the defendant, and paid his own money, and delivered them to Babcock & Co. upon being repaid that amount and his expenses. In either view we think the debt was discharged. It was an executed accord. Nothing remained executory, and it operated as a full satisfaction. A mere promise to accept less than the full amount of a debt although the sum promised has been paid has been held not sufficient; but when the security has been surrendered, or some act done of a like nature, there is no reason in law or morals, why the party should not be bound. (*Kromer* v. *Heim*, 75 N. Y. 574.)

It may be that the defendant intended to hold the policy of insurance to indemnify him for the deficiency, but there was no agreement to that effect, and the defendant's letters indicate that he had regarded the debt fully released and canceled. The defendant claims also to hold the policy as security for the balance of an additional indebtedness of $1,226.44 and interest, after applying the proceeds of a cargo of coal, the finding in respect to which is here inserted: "*Fourth.* On the 15th day of November, 1869, the defendant sold a cargo of coal to said Charles A. Babcock & Co., and took a note in payment therefor of $1,226.44, due March 15, 1870; the said last-mentioned cargo of coal was shipped to said Charles A. Babcock & Co., by the schooner Hepzibah, on or about the 21st day of February, 1870, the defendant through his agent, Edward Gullager, stopped the said last-mentioned cargo of coal *in transitu*, took possession thereof and disaffirmed the contract of sale therefor, and on the 4th day of May, 1870, sold the said last-mentioned cargo of coal to one E. S. Farrar." If this finding can be sustained as a finding of fact, it disposes of any claim for the debt. If the disaffirmance of the contract of sale of the coal depends as matter

of law upon the stoppage of the coal *in transitu*, then a more difficult and doubtful question is presented. Every intendment is in favor of the findings of fact, and findings may be implied if warranted by the evidence to sustain a judgment. The evidence as to the stoppage of the coal, as to the possession of the defendant, and the sale thereof by him does not present the facts as clearly as would be desirable upon this question. If the defendant took possession of the coal in the exercise of the right of stoppage *in transitu*, and sold the same without notice to Babcock & Co., and without their consent, and especially before the debt was due, an inference of an intention to disaffirm the contract of sale might be drawn, because upon the theory that this right is to enforce a lien, as claimed by the defendant, he must hold the property until the expiration of the credit, and be able to deliver it upon payment of the price, and the vendee has the right to pay the price, and take the property. According to that theory the credit is not abrogated, nor the sale, but the vendor is permitted to re-take the possession of the property, and hold it as security until the price is paid. If not paid at the time stipulated the vendor in analogy to other cases of lien, may sell the property upon giving notice.

The general rule upon the theory of a lien, must be that the vendor having exercised the right of stoppage *in transitu*, is restored to his position before he parted with the possession of the property. The property is vested in the vendee, and the vendor holds possession as security for the payment of the purchase-price. If therefore the defendant sold the coal without notice or consent, or if with consent of the vendees with the understanding that the sale was to be deemed rescinded the finding would be justified, and the defendant would have no claim upon this note.

The coal was sold to one Farrar, and a bill of sale thereof made by the defendant, and he received the purchase-money. The coal was sold, and the bill of sale and payment were not made until April, after the note became due, and there is some conflict in the evidence whether it was made with the knowledge or consent of Babcock & Co., or not.

As to the legal question, although the right of stoppage *in transitu* has been recognized in England for nearly two hundred years, there is great confusion in the books as to the origin of the right, and the principles upon which it is founded. As

late as 1841 Lord Abinger said, that "although the question of the right of stoppage *in transitu* had been as frequently raised as any other mercantile question within the last hundred years, it must be owned that the principle on which it depends has never been either settled or stated in a satisfactory manner.

"In courts of equity it has been a received opinion that it was founded on some principle of common law. In courts of law it is just as much the practice to call it a principle of equity which the common law has adopted."

Mr. Parsons, in his work on Admiralty, says, there are three ways, in either of which it might be supposed that the law of stoppage entered into the law of England. One, that it is based upon the civil law by which, in case of a sale, the property does not pass to the buyer until he has possession of the goods. It would follow that the seller would continue the owner until they reach the buyer, and that, by the insolvency of the latter, the goods would remain the property of the former. By the common law a sale does of itself pass the property to the buyer, without delivery. Another way is by implying a right of rescinding the contract of sale in case of insolvency, and that the act of stoppage was an exercise of that right, and a third way is by implying constructive possession in the seller for the purpose of the lien, to be enforced by the act of stoppage, or, in other words, that this right is an enlargement of the common law right of lien. (Parsons on Admiralty, 479.)

The rule seems not to have been settled in 1842. Parke, B., said: "What the effect of stoppage *in transitu* is, whether entirely to rescind the contract, or only to replace the vendor in the same position as if he had not parted with the possession, and entitle him to hold the goods until the price be paid down, is a point not yet fully decided, and there are difficulties attending each construction."

Mr. Bell, in his Commentaries on the Law of Scotland, favors the doctrine of rescission. He says: "Although there are many difficulties either way, it appears, on the whole, most consistent with the great lines of this doctrine of stoppage *in transitu*, that the seller's security over the goods sold, though perhaps in a large sense of the nature of a lien, is given by equity originally on the condition that the seller shall take back the goods, as if the contract were *ab initio* recalled."

There are some other authorities favoring the same view,

and there are others that favor the theory of a lien. (*Feise* v. *Wray*, 3 East, 93; *Ex parte Gwynne*, 12 Vesey, Jr. 379; 6 East, 21, note.)

Mr. Parsons says that the earlier English cases sustain the doctrine of a lien, and intimates that later authorities changed the ground to that of rescission, but that the latest returned to the original doctrine. (Parsons on Admiralty, 481.) Whatever uncertainty there may be as to the rule in England, the decisions in this country are quite preponderating in favor of the theory of a lien. (*Rowley* v. *Bigelow*, 12 Pick. 307; *Stanton* v. *Eager*, 16 id. 467–475; *Arnold* v. *Delano*, 4 Cush. 33, 39; *Newhall* v. *Vargas*, 13 Maine, 93; *S. C.* 15 id. 314, and cases cited; *Rogers* v. *Thomas*, 20 Conn. 53; *Ellis* v. *James*, 5 Ohio R. 88–98; *Harris* v. *Pratt*, 17 N. Y. 263.) The elementary writers favor the same view. (2 Kent's Com. 541; Parsons' Ad., 483; Parsons on Contracts, 598.) The question has never been, that I am aware, definitely decided in this State. As an original question the doctrine of rescission commends itself to my judgment as being more simple, and, in most cases, more just to both parties than the notion that the act of stoppage is the exercise of a right of lien, but in deference to the prevailing current of authority, I should hesitate in attempting to oppose it by any opinion of my own, and for that reason I do not deem it necessary to state the grounds which influence my judgment.

It is found as a fact that the policy was delivered to the defendant as collateral security for the payment of the first two notes referred to only, "and that the defendants never acquired or had any interest in said policy or in the moneys to accrue or become payable thereon, except as a creditor of the said firm, and to the extent of his claim upon the aforesaid two notes against the said firm." The evidence justified this finding. The letter of the defendant of March 1, 1876, shows that he did not then suppose that he had any legal indebtedness against Babcock & Co. At the time the policy was issued the cargo of coal for which the last note was given was in possession of the defendant as he claimed, and had not been disposed of, so that the balance, even if Babcock & Co. were liable for it, could not then be known, and in March after, in a letter to the defendant, introducing Mr. Wheelright, Babcock & Co. say: "We will avail ourselves of the opportunity to have him

arrange for the settlement of your claim against us, leaving in abeyance the cargo of Hepzibah, and the note given in settlement of the same."

The testimony of the insurance agent is to the effect that the policy was delivered to secure a fixed indebtedness, which could only refer to the first two notes. We are of opinion therefore that the defendant has no lien upon this money to secure the balance of the note given for that cargo of coal, even if Babcock & Co. are liable for it.

It follows that the judgment must be affirmed.

All concur, except EARL, J., dissenting.

Judgment affirmed.

STUBBS v. LUND

(7 Massachusetts, 453.—1811.)

REPLEVIN of a quantity of salt and coals. The defendant pleads in bar that the said salt and coals were the proper goods and chattels of Lemuel Weeks and William C. Weeks, traverses the property of the plaintiff, and prays a return to be adjudged him, with his damages and costs. The plaintiff tenders an issue on the traverse, which is joined by the defendant. A verdict was found for the plaintiff, agreeably to the directions of the judge, to which directions the defendant filed his exceptions, which were allowed by the judge.

From the exceptions it appears that the house of Logan, Lenox & Co. at Liverpool in England, of which the plaintiff was one, had shipped the cargo of salt and coals on board the ship Henry, Joseph Weeks master, on the credit, and on the account and risk of the said L. & W. C. Weeks, and consigned the same to them or their assigns, for which the master had signed bills of lading: but before the ship had left the port of Liverpool, the shippers, being informed of the insolvency of the consignees, refused to let the ship sail under the said shipment of the cargo. Afterwards on the master's signing other bills of lading, acknowledging the cargo to be shipped by the same persons, consigned to the plaintiff, the master was permitted to sail.

There was shown in evidence to the jury an agreement between Logan, Lenox & Co. and L. & W. C. Weeks, by which the former contracted to accept the draughts of the latter, or to advance them cargoes on credit, to a limited amount; also a copy of an account current, in which the cargo in question was charged by the former to the latter. The defendant is a deputy sheriff of this county, and had attached the goods in question as the property of the said L. & W. C. Weeks, at the suit of Daniel Tucker, in an action brought upon several promissory notes.

PARSONS, C. J. The title of the plaintiff is admitted to be good, if the consignors had, under the circumstances of this case, a right to stop the goods in question *in transitu*.

To this right the defendant has made two objections.

1. That the general credit given to the original consignees by the consignors, which is stated at large in the exceptions, had excluded the consignors from the right of stopping *in transitu* goods shipped and consigned pursuant to that agreement. But in our opinion, this objection cannot prevail. That agreement cannot bind the consignors after the insolvency of the consignees; the credit contemplated being predicated upon the supposed ability of the consignees to pay at the expiration of the credit. And a credit, given under such an agreement, can have no other effect on this question, than the credit given under the first bills of lading.

2. The other objection is, that the consignees being either the owners or the hirers of the ship *Henry*, as soon as the goods were received on board that ship, and bills of lading signed by the master, there was no further transit, the goods being in the possession and custody of the consignees. And to support this objection, it was urged by the defendant's counsel, that the right to stop *in transitu* extends only to goods shipped on board a general ship.

We think this objection cannot prevail. The right of stopping all goods shipped on the credit and risk of the consignee remains until they come into his actual possession at the termination of the voyage, unless he shall have previously sold them *bona fide*, and endorsed over the bills of lading to the purchaser. And in our opinion, the true distinction is, whether any actual possession of the consignee or his assigns, after the termination

of the voyage, be or be not provided for in the bills of lading. When such actual possession, after the termination of the voyage, is so provided for, then the right of stopping *in transitu* remains after the shipment. Thus, if goods are consigned on credit, and delivered on board a ship chartered by the consignee, to be imported by him, the right of stopping *in transitu* continues after the shipment (3 East, 381;) but if the goods are not to be imported by the consignee, but to be transported from the place of shipment to a foreign market, the right of stopping *in transitu* ceases on the shipment, the transit being then completed: because no other actual possession of the goods by the consignee is provided for in the bills of lading, which express the terms of the shipment. (7 D. & E. 442.[1])

The same rule must govern, if the consignee be the ship owner. If the goods are delivered on board his ship, to be carried to him, an actual possession by him, after the delivery, is provided for by the terms of the shipment; but if the goods are put on board his ship to be transported to a foreign market, he has on the shipment all the possession contemplated in the bills of lading. In the former case the transit continues until the termination of the voyage; but in the latter case the transit ends on the shipment.

We think, also, that the same distinction must exist in the case of a general ship. If a ship sail from this country to *Great Britain*, with the intention of taking on board goods for divers persons on freight, to be transported to a foreign market, as the mercantile adventures of different shippers; if goods are so shipped by the several consignors, there is no transit to the consignees after the shipment; and no right of stopping remains with the consignors. But it is otherwise when several persons import goods in a general ship on their own credit and risk, for a future actual possession by them is provided for in the bills of lading.

Upon the best view we have been able to give the case before us, we are satisfied that the verdict is right, and that judgment must be entered upon it.

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[1] *Rowley* v. *Bigelow*, 12 Pick. 307.

LOEB ET AL. v. PETERS ET AL.

(63 Alabama, 243.—1879.)

MANNING, J. Munter & Brother, being largely in debt, and insolvent, by an order requesting shipment to them, bought of plaintiffs, J. M. Peters & Brother, of Virginia, twenty-five boxes of tobacco; which they accordingly sent as directed, to Munter & Brother, at Montgomery, Alabama, by railroad, forwarding to them by mail a bill of lading therefor. On receipt of this, several days before the boxes arrived, Munter & Brother indorsed it, and transferred their right to the goods to J. Loeb & Brother, who gave them credit for the same, on a debt past due, which Munter & Brother owed them. There was no other consideration for this transfer. Soon afterwards, Peters & Brother, being informed of the insolvency of Munter & Brother, and claiming the right to stop the tobacco *in transitu*, demanded it of the carrier, the South & North Alabama Railroad Company, and sued the same in detinue for it, having first offered to pay the freight money. Loeb & Brother intervened as claimants, and thereby obtained possession of the goods. Whereupon, the suit was prosecuted against them, to a verdict and judgment in favor of Peters & Brother, from which Loeb & Brother have appealed to this court.

We do not concur in the opinion expressed in *Rogers* v. *Thomas*, 20 Conn. 54, that a vendor of goods, in transit to an insolvent vendee, cannot stop them on the way, before delivery, unless the insolvency of the vendee occurred after the sale to him of the goods. We think, with the Supreme Court of Ohio, that the vendor may stop the goods upon a subsequent discovery of insolvency existing at the time of the sale, as well as upon a subsequent insolvency. If there be a want of ability to pay, it can make no difference, in justice or good sense, whether it was produced by causes, or shown by acts, at a period before or after the sale.—*Benedict* v. *Shuettic*, 12 Ohio St. 515; *Reynolds* v. *Boston & M. R. R. Co.*, 43 N. H. 589; *O'Brien* v. *Norris*, 16 Md. 122; *Blum* v. *Marks*, 21 La. Ann. 268. The best definition of the right which we have seen, is that in Parsons's Mercantile Law, as follows: "A seller, who has sent goods to a buyer at a distance, and, after sending them, finds that the

buyer is insolvent, may stop the goods at any time before they reach the buyer. His right to do this is called the right of stoppage *in transitu*." Chap. X., p. 60.

If, before this right is exercised, the buyer sells the goods, and indorses the bill of lading for them to a purchaser in good faith, and for value, the right of the first vendor to retake them is extinguished.—*Lickbarrow* v. *Mason*, 1 Smith's Lead. Cases, 388. Evidence, therefore, that Loeb & Brother knew, when they took a transfer of the bill of lading, that Munter & Brother were insolvent, was relevant and proper to show, in connection with other testimony, that Loeb & Brother were not *bona fide* purchasers. And there was no error in permitting a witness to testify what one of that firm had previously said, tending to show such knowledge, when he was giving evidence in another cause. Statements and declarations, relevant to the matter in hand, which have been made by a party to a cause, may be proved against him, without his adversary being compelled to use such party as a witness in a suit in which he is interested.

The two judgments against Munter & Brother, in favor of creditors, confessed by the former before the tobacco had reached its destination, and the seizure upon execution the next day of property of Munter & Brother, by the sheriff, tended to prove their insolvency; and the evidence of those facts was, therefore, properly admitted.

The transfer of a bill of lading, as a collateral to previous obligations, without anything advanced, given up, or lost on the part of the transferee, does not constitute such an assignment as will preclude the vendor from exercising the right of stoppage *in transitu*. Said Bradley, Circuit Justice, in *Lesassier* v. *The Southwestern*, 2 Woods, 35: "Nothing short of a *bona fide* sale of the goods for value, or the possession of them by the vendee, can defeat the vendor's right of stoppage *in transitu*; and hence it has been held, that an assignee in trust for creditors of the insolvent vendee is not a purchaser for value, and, consequently, takes subject to the exercise of any right of stoppage *in transitu* which may exist against the assignor.—*Harris* v. *Pratt*, 17 N. Y. 249." Wherefore, it was held in the latter case, that an attachment in the suit of the vendee's creditor, of goods landed by the carrier upon a wharf-boat at the place of delivery, did not prevent the vendor from stopping them *in transitu*. See also, *O'Brien* v. *Norris*, 16 Md.

122; *Naylor* v. *Dennie*, 8 Pick. 199; *Nicholas* v. *Lefeuvre*, 2 Bingh. (N. C.) 83. The doctrine is based upon the plain reason of justice and equity, enunciated in *D'Aguila* v. *Lambert*, 2 Eden's Ch. 77, that "one man's property should not be applied to the payment of another man's debt." The right itself is regarded as an extension merely of the lien for the price, which the seller of goods has on them while remaining in his possession; which lien the courts will not permit to be superseded, before the vendee, who has become insolvent, obtains possession, unless, in the meantime, the goods have been sold to a person who, in good faith, has paid value for them, and so would be a loser *by his purchase*, if that were held invalid. Appellants having only credited Munter & Brother on the debt previously due from them, with the price of the tobacco, have nothing more to do, in order to get even, than to *debit* them with the same sum, for the non-delivery of the goods, in consequence of the defect in Munter & Brother's title.

The case of *Crawford* v. *Kirksey*, 55 Ala. 282, so much relied on by appellants, is wholly unlike this. The question of stoppage *in transitu* was in no way involved in it. The controversy there was, whether a conveyance by a debtor in a failing condition, of property which was indisputably and entirely his, in payment of a debt to one of his creditors, was not void as to the others; and this court decided, that the law permitted such a preference, and that the transaction was not fraudulent in fact.

It results from what we have said, that there was no error in the charges to the jury.

Let the judgment of the Circuit Court be affirmed.

JONES v. EARL.

(37 California, 630.—1869.)

ACTION for conversion.

Plaintiff wrote defendant as follows:

"SAN FRANCISCO, November 18th, 1867.

"Messrs. D. W. EARL & Co.

"*Gents:*—On the eleventh instant we shipped to your care the following goods, viz:

Two barrels whiskey.
Two casks ale.
Two casks porter.
Four baskets champagne.
Four cases Hostetter's bitters.

"Marked: F. M. A.,

"*Virginia City,*

"Care EARL, Cisco.

"If the goods have not been forwarded yet from Cisco, please hold on to them till you hear from us again, as the party to whom they were consigned at Virginia has been attached, and we want to save the goods. If they have been forwarded from Cisco, please instruct your agent at Virginia to deliver the goods to no one but our agent, Mr. J. A. Byers, who will be at Virginia on the lookout for the goods.

"Please write us immediately whether the goods have been sent; if not, Mr. Byers will call for them at Cisco.

"Very respectfully,

"BIGGS & JONES."

SANDERSON, J. Stoppage *in transitu* is a right which the vendor of goods upon credit has to recall them, or retake them, upon the discovery of the insolvency of the vendee, before the goods have come into his possession, or any third party has acquired *bona fide* rights in them. It continues so long as the carrier remains in the possession and control of the goods, or until there has been an actual or constructive delivery to the vendee, or some third person has acquired a *bona fide* right to them. Upon demand by the vendor, while the right of stop-

page *in transitu* continues, the carrier will become liable for a conversion of the goods, if he decline to redeliver them to the vendor, or delivers them to the vendee. (*Markwald* v. *His Creditors*, 7 Cal. 213; *Blackman* v. *Pierce*, 23 Cal. 508; *O'Neil* v. *Garrett*, 6 Iowa, 480; *Reynolds* v. *Railroad*, 43 N. H. 580.) And a notice by the vendor, without an express demand to redeliver the goods, is sufficient to charge the carrier. If the carrier is clearly informed that it is the intention and desire of the vendor to exercise his right of stoppage *in transitu*, the notice is sufficient. (*Reynolds* v. *Railroad*, *supra*; *Litt* v. *Cowley*, 7 Taunton, 169; *Whitehead* v. *Anderson*, 9 M. & W. 518; *Bell* v. *Moss*, 5 Wharton, 189.) And notice to the agent of the carrier, who in the regular course of his agency is in the actual custody of the goods at the time the notice is given, is notice to the carrier. (*Bierce* v. *Red Bluff Hotel Co.*, 31 Cal. 160.)

The case made by the record shows that the goods in question were consigned to the care of the defendant at Cisco, to be forwarded by him in the usual course of business to the vendee at Virginia City. That the defendant was engaged in the forwarding business at Sacramento, and had an agent at Cisco whose business it was to receive all goods shipped to the care of defendant, and deliver them to the order of the vendee upon payment of charges and commissions. That, while the goods were at Cisco and in the custody of the defendant's agent, who had full charge of the forwarding business at that place, a letter from the plaintiff, addressed to the defendant at Cisco, containing a bill of the goods, and informing the defendant that the vendee had been *attached*, and that he wanted to save the goods, and directing the defendant not to deliver the goods to any one except his (the plaintiff's) agent at Virginia City, who would be looking out for them, was received by the defendant's agent at Cisco. That the defendant, by his agent, acknowledged the receipt of the letter, and stated that the goods were "in store and he would hold them subject to the order of Byers" (plaintiff's agent). That afterwards the vendee of the goods came to the agent of defendant and, tendering charges and commissions, demanded the goods, and that the demand was complied with. That the vendee was insolvent at the date of the notice to defendant's agent that the plaintiff desired to stop the goods in his hands.

In view of these facts, and the law as above declared, the defendant is clearly liable for a conversion of the goods.

Judgment and order affirmed.

Becker v. Hallgarten et al.

(86 New York, 167.—1881.)

Action for conversion.

Prior to August 2, 1876, Wilhelm & Boerner of Berlin, Germany, sold three cases of goods to Boas & Stern of the same city, and delivered to them invoices of said goods. Boas & Stern then directed that the goods be shipped to the plaintiff at Bremen. They were so shipped. On August 2, 1876, Boas & Stern applied to one Goldstein, a banker in Berlin, for a loan of 3,000 marks, upon the security of said goods and bills of lading. The loan was so made. Boas & Stern then gave an order on plaintiff to hold the goods subject to Goldstein's order, which Goldstein immediately forwarded to plaintiff with directions to ship goods to defendants at New York, and notified defendants that the goods were consigned to them, to be delivered by them to one Stern (not a member of the firm of Boas & Stern) on payment of 3,000 marks and expenses. On August 4, the goods were so shipped under bills of lading running to defendants.

On August 19, "plaintiff, in behalf of Wilhelm & Boerner by cable to defendants stopped the goods *in transitu*, and they having the bills of lading, thereafter agreed to hold them for plaintiff's account."

On October 6, 1896, Wilhelm & Boerner executed the following paper: "The undersigned hereby assign to Heinrich Becker, of Bremen, our claim on accepted draft for 2,500 marks, and 1,562.55 marks balance of account, with all rights unto us belonging."

On November 6, plaintiff demanded the goods and offered to pay charges thereon.

By the Commercial Code of Germany, in force at the time, transfer of the legal title to goods shipped under bills of lading could only be made by the written indorsement of the consignee.

Judgment for plaintiff was affirmed by the General Term of the Court of Common Pleas of the city of New York.

DANFORTH, J. Becker was at no time in the course of these transactions the agent or representative of the vendors. Until and including the shipment of the goods he was the agent of Boas & Stern, the vendees, or of Goldstein. He obeyed, as was proper, at the different stages of the affair, first one and then the other of these parties. If his special character ceased with the shipment, he neither entered the employ of the vendors, nor did he act under any instruction received from them. The finding, therefore, that in behalf of the vendors he stopped the goods, is without evidence to support it. Assuming, in the next place (for the purpose only of this discussion), that by the assignment above set out, he became vested with a vendor's right to stop goods while on their way to an insolvent purchaser, it is one which, we think, cannot be exercised in this case, for the reasons: *First*, that the transit was over before the goods left Germany. They were sent by the vendors to Becker, as the vendees' agent at Bremen. The shipment was preceded by, and was in consequence of, a request by B. & S. to the vendors, "to send the boxes" to Becker "at our disposition." Therefore, on the 28th of July, informing Becker of the shipment to him, "at the request of and for account of Messrs. B. & S. of Berlin," they write, we have sent you part of the goods in question and "request you to carry out the further instruction of said parties concerning the same;" and in the next letter, communicating the shipment of the balance, they say, "and request you hereby to let Messrs. B. & S. have the further disposal thereof." It is obvious, then, that the impulse impressed upon the goods by the vendors carried them only to Bremen. Some other action was necessary on the part of the vendees before they moved again. They, at that point, transferred the goods to Goldstein, and made them, in the hands of Becker, subject to his order. The trial court finds not only a "taking of the goods by him as security," but that Boas & Stern "directed Becker to hold and ship the goods according to Goldstein's directions." This was done. The bills of lading were issued in favor of strangers to the vendees, and who represent a party having actual custody and the right of disposition. The shipment and the consignment by the vendors ended at Bremen. At that

place new interests attached, in promotion of which the goods were sent forward. The only consignment by W. & B. was to Becker at Bremen.

It has been held that the delivery to the vendee, which puts an end to the state of passage, may be at a place where he means the goods to remain until a fresh destination is communicated to them by orders from himself. (*Valpy* v. *Gibson*, 4 C. B. 837; *Biggs* v. *Barry*, 2 Curt. 259; *Bolton* v. *L. & Y. R. W. Co.*, L. R. 1 Com. Pl. 439; also *Dixon* v. *Baldwin*, 5 East, 175; and this case is approved in *Covell* v. *Hitchcock*, 23 Wend. 611.) In the case before us, it is plain that they had reached the place for which they were intended, under the direction given by the vendors, and had come under the actual control of the vendees. *Dixon* v. *Baldwin*, *supra*, is commented upon in *Harris* v. *Pratt*, 17 N. Y. 249, and distinguished from the rule thought applicable to the facts of that case. There the suspense in transportation was temporary, and to be resumed at a future time in the direction already given by the vendors. But, in the case before us, not only is the actual fact like that in *Dixon* v. *Baldwin*, but if the detention at Bremen was originally intended only to give the vendees an opportunity to determine by which of several routes, or at what time, as in *Harris* v. *Pratt*, the goods should go on, we have the additional vital circumstance before adverted to of a complete possession and control by the vendees, and its transfer to a third party, who also took the actual possession and control of the goods, and has since retained them. Neither *Harris* v. *Pratt*, nor any of the other cases cited by the appellant, go to the extent of upholding the vendor's lien in such a case.

Second. The transaction between Goldstein and the vendees was effectual to pass the property to him and so deprive the vendors of the right of stoppage if it otherwise existed. That right may always be defeated by indorsing and delivering a bill of lading of the goods to a *bona fide* indorsee for a valuable consideration, without notice of the facts on which the right of stoppage would otherwise exist. This was held in *Lickbarrow* v. *Mason*, 2 T. R. 63, and has since been deemed established. It does not impair the force of this position that the money was in fact advanced before the delivery of the bill of lading. The goods were in the possession of Goldstein when he paid over the money. The bill of lading was promised and was part of the consideration on which the money was paid, but more than

all he had the right, under the authority given to him by B. & S., to take the bill of lading in any form, and it was made out for his benefit. (*City Bk.* v. *R., W. & O. R. R.*, 44 N. Y. 136.) Nor is it material, unless made so by the German law (*infra*), that the bill of lading was not indorsed. It was not necessary that it should be. Hallgarten & Co. were Goldstein's agents, subject to his control, and in making the bill of lading in their names as consignees all was effected which the indorsement of a bill taken in the name of B. & S. would have accomplished. The cases cited by the respondent (*Meyerstein* v. *Barber*, L. R. 2 Com. Pl. 45; *Short* v. *Simpson*, 1 id. 255), show that a bill so indorsed has the same effect, even if the ship containing the goods was at sea, as delivery of the goods themselves. Here there was a delivery of the goods to Goldstein, and the bill of lading followed the possession.

Third. The German law, as set out in evidence, has no application to the case in hand. It applies when the bill of lading is taken in the name of the vendee or of some person through whom the party claiming its benefit must make title. The observations already made show that in our opinion this is not the plaintiff's position. Nor are the defendants estopped from disputing the plaintiff's title. There is no finding of any fact upon which such doctrine can rest; no change of position by the plaintiff; a promise at most by the defendants without consideration, in violation of duty to their principals and in fraud of their rights. If it forms the foundation of any action, it cannot be one the effect of which is to deprive a third party of his property, or subject the defendant to a second action by the real owner of the goods. The right of stoppage, when it exists, depends upon equity, and that of the defendants, by virtue of their representative character, is superior in any view to the plaintiff's. If liable at all, it would be upon their assumpsit to keep the goods on his account. But what damages could the plaintiff show from the breach of an agreement to keep for him, or subject to his order, goods to which another person was entitled, and whose claim was as to him exclusive?

Some other grounds are urged by the respondent on which he claims the judgment may be sustained. They have been examined, and are deemed untenable. The reasons for this conclusion need not be stated, since however decided, they

would be insufficient to overcome the appellants' objections which have been already declared well taken.

The judgment appealed from should be reversed and a new trial granted, with costs to abide the event.

All concur, except FOLGER, Ch. J., absent from argument.

Judgment reversed.

TUFTS v. SYLVESTER.

(79 Maine, 213.—1887.)

PETERS, C. J. The plaintiff sold a bill of goods to be shipped at Boston to the buyer at Farmington in this state. The buyer, becoming insolvent after the purchase, countermanded the order, but not in season to stop the goods. Before the goods came, he had gone into insolvency, and a messenger had taken possession of his property. An express company, bringing the goods, tendered them to the buyer, who refused to receive them, but the messenger accepted the goods from the carrier, paying his charges thereon. After this, but before an assignee was appointed, the seller made a demand upon both the carrier and the messenger, attempting to reclaim his goods. The question, upon these facts, is whether the goods were seasonably stopped *in transitu* to preserve the plaintiff's lien thereon. We think they were. The right of stoppage *in transitu* is favored by the law.

It is clear that the goods did not go into the buyer's possession. He refused to receive them. He had a moral and legal right to do so. Such an act is commended by jurists and judges. He in this way makes reparation to a confiding vendor. "He may refuse to take possession," says Mr. Benjamin, "and thus leave unimpaired the right of stoppage *in transitu*, unless the vendor be anticipated in getting possession by the assignees of the buyer." Benj. Sales, § 858. In *Grout* v. *Hill*, 4 Gray, 361, Shaw, C. J., says: "where a purchaser of goods on credit, finds that he shall not be able to pay for them, and gives notice thereof to the vendor, and leaves the goods in possession of any person, when they arrive, for the use of the vendor, and the vendor, on such notice, expressly or tacitly assents to it, it is a

good stoppage *in transitu*, although the bankruptcy of the vendee intervene." See same case at page 369. 1 Pars. Con. *596, and cases.

The decision of the case, then, turns upon the question whether the messenger could accept the goods, and terminate the lien of the vendor. We do not find any authority for it. A bankruptcy messenger acts in a passive capacity—is intrusted with no discretionary powers—acts under mandate of court, or does certain things particularly prescribed by the law which creates the office—is mostly a keeper or defender of property, a custodian until an assignee comes—and he can neither add to nor take from the bankrupt's estate. He is to take possession of the "estate" of the insolvent. These goods had not become a part of the estate. He was not at liberty to affirm or disaffirm any act of the insolvent. The law imposes on him no such responsibility. Chancellor Kent says, that the transit is not ended while the goods are in the hands of a carrier or middleman. A messenger has no greater authority, *ex officio*, than a middle-man, excepting as the insolvent law expressly prescribes. In Hilliard's Bankruptcy, page 101, the office of a messenger is likened to that of a sheriff under a writ; he becomes merely the recipient of property. The title of the assignee, when appointed, dates back of the appointment of a messenger. Until appointment of assignee, the bankrupt himself is a proper person to tender money for the redemption of lands sold for taxes. *Hampton* v. *Rouse*, 22 Wall. 213. See *Stevens* v. *Palmer*, 12 Metc. 264. The case cited by the plaintiff, *Gates* v. *Hoile*, 2 Neb. 186, supports his contention.

Defendant defaulted.

WALTON, VIRGIN, LIBBEY, EMERY, and HASKELL, JJ., concurred.

Messmore v. The New York Shot and Lead Co.

(40 New York, 422.—1869.)

Action to recover damages for breach of the following contract:

"New York, *June* 8, 1861.

"Mr. Daniel Messmore, No. 23 William Street:

"*Dear Sir*,—We will fill your order for 100,000 lbs. of Minie bullets—58 calibre, U. S. Rifle Musket—and deliver them on board such lines as you may direct, as rapidly as possible, on the following terms:

"The price to be 7 c. per lb. If packed in kegs the charge to be 12c. per 100 lbs., and cartage 50 c. per ton. The terms of payment to be *prompt cash* for each lot as delivered, to be paid on presentation of invoice and bill of lading.

"Respectfully yours,

"N. Y. Shot and Lead Co.

"By J. E. Granniss."

When the plaintiff gave his order, he was under contract to furnish the state of Ohio with the same number and quality of bullets at seven and three-fourths cents per pound, and the defendants were so informed. Twenty thousand lbs. were sent to the quartermaster-general of Ohio, but were rejected as not conforming to the contract. The plaintiff then offered to return the bullets to the defendants, but they refused to receive them. Plaintiff then sold them at Columbus, Ohio, without notice to defendants, for the best price he could obtain, viz., four and a half cents per pound. At the trial it was proved, that bullets of the kind contracted for, were worth at that time, at Columbus, nine cents per pound.

Judgment for plaintiff was affirmed by the General Term of the New York Common Pleas.

Mason, J. It is not necessary to decide, in this case, whether the plaintiff was entitled, upon the evidence, to recover the value of these bullets upon the market price in Ohio, as shown by the evidence, or whether the court erred in

admitting the evidence to show the value of such bullets there, as the verdict of the jury shows that no such rule of damages was adopted by the jury in giving this verdict. They simply allowed to the plaintiff the profits which he would have made had the contract been fulfilled, to wit: Three-fourths of a cent per pound, and the express charges and storage on what was sent. The plaintiff submitted two statements: One made upon the basis that he was entitled to recover just the difference between the purchase price and the price at which he had contracted for their resale to the State of Ohio, with the express charges which he had paid on those sent, which were refused because of their inferior quality; the other was the difference between the seven cents per pound and the nine cents, which the evidence showed them worth in Ohio. These statements were all carried out in items and figures, the first statement making the plaintiff's claim for damages $1,128.50, and the second $1,949.22, and the verdict of the jury was $1,128.50; showing conclusively that they adopted the first statement without computation, and gave the plaintiff, as damages, no more than the profits he would have made had the contract been fulfilled, and what he paid out for express charges on those sent which were refused. The defendants claim and insist, however, that this collateral contract of the plaintiff with the State of Ohio was improperly allowed in evidence and could not be allowed as the basis of damages between these parties; that in short the plaintiff can only recover the difference between the contract price and the market value in the city of New York where the contract of sale was made, and where the property was to be delivered under the contract.

The general rule of damages, ordinarily, is the difference between the contract price and the market value of the article at the time and place of delivery fixed by the contract. This is not the invariable rule in all cases. The general rule is, that the party injured by a breach of a contract, is entitled to recover all his damages, including gains prevented as well as losses sustained, provided they are certain, and such as might naturally be expected to follow the breach. In commodities commonly purchasable in the market, it is safe to say that the purchaser is made whole, when he is allowed to recover the difference between the contract price and the value of the article in the market at the time and place of delivery; because he

can supply himself with this article by going into the market and making his purchase at such price, and these are all the damages he is ordinarily entitled to recover, for nothing beyond this is within the contemplation of the parties when they entered into the contract.

This rule, however, is changed when the vendor knows that the purchaser has an existing contract for a re-sale at an advanced price, and that the purchase is made to fulfill such contract, and the vendor agrees to supply the article to enable him to fulfill the same, because those profits which would accrue to the purchaser upon fulfilling the contract of re-sale, may justly be said to have entered into the contemplation of the parties in making the contract. (*Griffin* v. *Colver*, 16 N. Y. R. 493.) This rule is based upon reason and good sense, and is in strict accordance with the plainest principles of justice. It affirms nothing more than that where a party sustains a loss by reason of a breach of a contract, he shall, so far as money can do it, be placed in the same situation with respect to damages, as if the contract had been performed.

It was clearly competent for the plaintiff to show that the defendants were informed of the object of the plaintiff in making this contract of purchase of them, and that it was to fulfill an existing contract of his own with the State of Ohio at a price of three-fourths of one cent per pound, above the price he was to pay them, and that they were to manufacture these bullets to enable him to fulfill such contract, because it showed that these profits to this plaintiff were in the contemplation of the parties in entering into this contract, and as the evidence showed such to be the fact, these profits that would have accrued to the plaintiff had the contract been performed by the defendants are in no sense speculative or uncertain profits. The result of a non-performance is a practical and certain loss to the plaintiff to that extent, unless the plaintiff could have supplied himself by going into the market, and making a purchase to fulfill his contract, which, at that particular time, it is pretty evident, he could not do, as lead went up, after the making of this contract, rapidly, and bullets were sold in Ohio for nine cents in a month after the making of this contract; and the plaintiff testified that he was offered nine cents for a good Minie bullet by two or three different persons, and that Woods offered him that for 100,000 lbs., if delivered within ten days.

This was in July and August, only a month or two after this contract was entered into, and the demand became so great that lead went up five to six cents a pound. The evidence fails to show that these bullets were sacrificed in the sale of them by the plaintiff; on the contrary, the evidence is they were sold for all they were worth. (See case, fols. 82 and 46.) This case does not fall within the principle of *Reed* v. *Randall*, 29 N. Y. R. 358, as the plaintiff never had an opportunity to examine the bullets and no inspection was ever made of them by the plaintiff, or any one in his behalf. They were put up in bags and kegs by the defendants and actually shipped by them in their own name, and the contract itself required them to deliver them to such lines of transportation as the plaintiff should direct, and evidently the plaintiff had no opportunity to examine them and therefore cannot be held to have made such an acceptance as to deprive him of his action.

The plaintiff had the right to sell these bullets at the best price he could obtain for them, after his offer to return them, and the defendants' refusal to receive them; and the law did not require him to give notice to the defendants of the time and place of sale. (*Pollen & Colgate* v. *Le Roy & Smith*, 30 N. Y. R. 549.) This is not very material, however, as the evidence is they were sold for all they were worth.

There was no error committed in allowing the plaintiff to recover what he paid out for transportation, on these bullets. By his contract with the State of Ohio, the State were to pay these expenses of transportation, and as they refused to receive them because of their defects, the plaintiff has sustained this loss, and the defendants cannot complain of this, when they accepted his order and actually shipped them by express themselves.

The judgment should be affirmed.

HUNT, CH. J., WOODRUFF, GROVER, JAMES and LOTT were for affirmance on the ground stated in the foregoing opinion.

Judgment affirmed.[1]

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[1] Opinion by DANIELS, J., omitted.

KOUNTZ v. KIRKPATRICK ET AL.

(72 Pennsylvania, 376.—1872.)

ACTION of assumpsit brought by Joseph Kirkpatrick and James Lyons, trading as Kirkpatrick & Lyons, to the use of Frederick Fisher & others, trading as Fisher Brothers, against William J. Kountz, for failure to deliver 2,000 barrels of crude petroleum under a contract of sale made on the 7th day of June, 1869.

Verdict for plaintiffs; defendant took out a writ of error.

AGNEW, J. The second, third, fifth, sixth, seventh, eighth, eleventh, twelfth, thirteenth, fourteenth, fifteenth and sixteenth errors, are not well assigned, for all the answers of the court to the points were omitted. When a court simply refuses a point, the error is well assigned by reciting the point, and stating that it was refused. But when the judge answers specially, in order to introduce a qualification he deems necessary to make his instruction correct, the answer must be recited as well as the point. We shall not decline considering, however, all the important questions; and in order to discuss them, we may state succinctly the nature of the case. On the 7th of June, 1869, Kountz sold to Kirkpatrick & Lyons, two thousand barrels of crude petroleum, to be delivered at his option, at any time from the date, until the 31st of December, 1869, for cash on delivery, at thirteen and a half cents a gallon. On the 24th of June, 1869, Kirkpatrick & Lyons assigned this contract to Fisher & Brothers. Kountz failed to deliver the oil. He defends on the ground that Kirkpatrick & Lyons, and others holding like contracts for delivery of oil, entered into a combination to raise the price, by buying up large quantities of oil, and holding it till the expiration of the year 1869, and thus to compel the sellers of oil on option contracts, to pay a heavy difference for non-delivery. Fisher & Brothers, the assignees of Kountz's contract, were not in the combination, and the principal questions are whether they are affected by the acts of Kirkpatrick & Lyons, subsequent to the assignment; whether notice of the assignment to Kountz was necessary to protect them, and what is the true measure of damages. The court below held that Fisher &

Brothers, as assignees of the contract, were not affected by the acts of Kirkpatrick & Lyons, as members of the combination in the following October and subsequently, and that notice in this case was not essential to the protection of Kountz.

The common-law rule as to the assignability of choses in action no longer prevails, but in equity the assignee is looked upon as the true owner of the chose. He may set off the demand as his own: *Morgan* v. *Bank of North America*, 8 S. & R. 73; *Ramsey's Appeal*, 2 Watts, 228. The assignee takes the chose subject to the existing equities between the original parties before assignment, and also to payment and other defenses to the instrument itself, after the assignment and before notice of it; but he cannot be affected by collateral transactions, secret trusts, or acts unconnected with the subject of the contract: *Davis* v. *Barr*, 9 S. & R. 137; *Beckley* v. *Eckert*, 3 Barr, 292; *Mott* v. *Clark*, 9 id. 399; *Taylor* v. *Gitt*, 10 id. 428; *Northampton Bank* v. *Balliet*, 8 W. & S. 318: *Corsen* v. *Craig*, 1 Wash. C. C. R. 424; 1 Parsons on Cont. 193, 196; 2 Story on Cont. § 396 *n*.

The act of Kirkpatrick & Lyons, complained of as members of an unlawful combination to raise the price of oil, was long subsequent to their assignment of Kountz's contract, and was a mere tort. The contract was affected only by its results as an independent act. It does not seem just, therefore, to visit this effect upon Fisher & Brothers, the antecedent assignees. The act is wholly collateral to the ownership of the chose itself, and there is nothing to link it to the chose, so as to bind the assignors and assignees together. After the assignment, there being no guaranty, the assignors had no interest in the performance of this particular contract, and no motive, therefore, arising out of it to raise the price on Kountz. The acts of Kirkpatrick & Lyons seem, therefore, to have no greater or other bearing on this contract than the acts of any other members of the combination, who were strangers to the contract.

In regard to notice of the assignment to Kountz, it is argued, that having had no notice of it, if he knew of the conspiracy to raise the price of oil, and thus to affect his contract, and that Kirkpatrick & Lyons were parties to it, he might have relied on that fact as a defense, and refused to deliver the oil, and claimed on the trial a verdict for merely nominal damages for his breach of his contract. Possibly in such a special case,

want of notice might have constituted an equity, but the answer to this case is, that no such point was made in the court below, and there does not seem to be any evidence that Kountz knew of the conspiracy, and Kirkpatrick & Lyons's privity, and relying on these facts, desisted from purchasing oil to fulfil his contract with them. As the case stood before the court below, we discover no error in the answers of the learned judge on this part of it.

The next question is upon the proper measure of damages. In the sale of chattels, the general rule is, that the measure is the difference between the contract price and the market value of the article at the time and place of delivery under the contract. It is unnecessary to cite authority for this well established rule, but as this case raises a novel and extraordinary question between the true market value of the article, and a stimulated market price, created by artificial and fraudulent practices, it is necessary to fix the true meaning of the rule itself, before we can approach the real question. Ordinarily, when an article of sale is in the market, and has a market value, there is no difference between its value and the market price, and the law adopts the latter as the proper evidence of the value. This is not, however, because value and price are really convertible terms, but only because they are ordinarily so in a fair market. The primary meaning of value is worth, and this worth is made up of the useful or estimable qualities of the thing: See Webster's and Worcester's Dictionaries.

Price, on the other hand, is the sum in money or other equivalent set upon an article by a seller, which he demands for it: Id. Ibid. Value and price are, therefore, not synonyms, or the necessary equivalents of each other, though commonly, market value and market price are legal equivalents. When we examine the authorities, we find also that the most accurate writers use the phrase market *value*, not market price. Mr. Sedgwick, in his standard work on the measure of damages, 4th ed. p. 260, says: "Where contracts for the value of chattels are broken by the vendor's failing to deliver property according to the terms of the bargain, it seems to be well settled, as a general rule, both in England and the United States, that the measure of damages is the difference between the contract *price* and the market *value* of the article at the time it should be delivered upon the ground; that this is the plaintiff's real

loss, and that with this sum, he can go into the market and supply himself with the same article from another vendor." Judge Rogers uses the same term in *Smethurst* v. *Woolston*, 5 W. & S. 109: "The *value* of the article at or about the time it is to be delivered, is the measure of damages in a suit by the vendee against the vendor for a breach of the contract." So said C. J. Tilghman, in *Girard* v. *Taggart*, 5 S. & R. 32. Judge Sergeant, also, in *O'Conner* v. *Forster*, 10 Watts, 422, and in *Mott* v. *Danforth*, 6 id. 308. But as even accurate writers do not always use words in a precise sense, it would be unsatisfactory to rely on the common use of a word only, in making a nice distinction between terms. It is therefore proper to inquire into the true legal idea of damages in order to determine the proper definition of the term value. Except in those cases where oppression, fraud, malice or negligence enter into the question, "the declared object (says Mr. Sedgwick, in his work on Damages) is to give *compensation* to the party injured for the actual loss sustained," 4th ed., pp. 28, 29; also, pp. 36, 37. Among the many authorities he gives, he quotes the language of C. J. Shippen, in *Bussy* v. *Donaldson*, 4 Dallas, 206. "As to the assessment of damages (said he), it is a rational and legal principle, that the compensation should be equivalent to the injury." "The rule," said C. J. Gibson, "is to give actual compensation, by graduating the amount of the damages exactly to the extent of the loss." "The measure is the actual, not the speculative loss:" *Forsyth* v. *Palmer*, 2 Harris, 97. Thus, compensation being the true purpose of the law, it is obvious that the means employed, in other words, the evidence to ascertain compensation, must be such as truly reaches this end.

It is equally obvious, when we consider its true nature, that as evidence, the market price of an article is only a means of arriving at compensation; it is not itself the value of the article, but is the evidence of value. The law adopts it as a natural inference of fact, but not as a conclusive legal presumption. It stands as a criterion of value, because it is a common test of the ability to purchase the thing. But to assert that the price asked in the market for an article is the true and only test of value, is to abandon the proper object of damages, viz., compensation, in all those cases where the market evidently does not afford the true measure of value. This thought is well expressed by Lewis, C. J., in *Bank of Montgomery* v. *Reese*, 2 Casey, 146.

"The paramount rule in assessing damages (he says), is that every person unjustly deprived of his rights, should at least be fully compensated for the injury he sustained. Where articles have a determinate value and an unlimited production, the general rule is to give their value at the time the owner was deprived of them, with interest to the time of verdict. This rule has been adopted because of its convenience, and because it in general answers the object of the law, which is to compensate for the injury. In relation to such articles, the supply usually keeps pace with the demand, and the fluctuations in the value are so inconsiderable as to justify the courts in disregarding them for the sake of convenience and uniformity. In these cases, the reason why the value at the time of conversion, with interest, generally reaches the justice of the case, is that when the owner is deprived of the articles, he may purchase others at that price. But it is manifest that this would not remunerate him where the article could not be obtained elsewhere, or where from restrictions on its production, or other causes, its price is necessarily subject to considerable fluctuation." This shows that the market price is not an invariable standard, and that the converse of the case then before Judge Lewis is equally true—that is to say—when the market price is unnaturally inflated by unlawful and fraudulent practices, it cannot be the true means of ascertaining what is just compensation. It is as unjust to the seller to give the purchaser more than just compensation, as it is to the purchaser to give him less. Right upon this point, we have the language of this court in the case of a refusal by a purchaser to accept: *Andrews* v. *Hoover*, 8 Watts, 240. It is said: "The jury is bound by a measure of damages where there is one, but not always by a particular means for its ascertainment. Now the measure in a case like the present, is the difference between the price contracted to be paid and the value of the thing when it ought to have been accepted; and though a resale is a convenient and often satisfactory means, it does not follow that it is, nor was it said in *Girard* v. *Taggart*, to be the only one. On the contrary, the propriety of the direction there, that the jury were not bound by it, if they could find another more in accordance with the justice of the case, seems to have been admitted; the very thing complained of here." Judge Strong took the same view in *Trout* v. *Kennedy*, 11 Wright, 393. That was the case of a trespasser, and the jury had been told

that the plaintiff was entitled to the just and full value of the property, and if at the time of the trespass the market was depressed, too much importance was not to be given to that fact. "If (says Judge Strong) at any particular time, there be no market demand for an article, it is not of course on that account of no value. What a thing will bring in the market at a given time, is perhaps the measure of its value then; but it is not the only one." These cases plainly teach that value and market price are not always convertible terms; and certainly there can be no difference in justice or law, in an unnatural depression and an unnatural exaltation in the market price—neither is the true and only measure of value.

These general principles in the doctrine of damages and authorities, prove that an inflated speculative market price, not the result of natural causes, but of artificial means to stimulate prices by unlawful combinations for the purposes of gain, cannot be a legitimate means of estimating just compensation. It gives to the purchaser more than he ought to have, and compels the seller to pay more than he ought to give, and it is therefore not a just criterion. There is a case in our own state, bearing strongly on this point: *Blydenburgh et al.* v. *Welsh et al.*, Baldwin's Rep. 331. Judge Baldwin had charged the jury in these words: "If you are satisfied from the evidence, that there was on that day a *fixed* price in the market, you must be governed by it; if the evidence is doubtful as to the price, and witnesses vary in their statements, you must adopt that which you think best accords with the proof in the case." In granting a new trial, Judge Hopkinson said: "It is the price—the market price—of the article that is to furnish the measure of damages. Now what is the price of a thing, particularly the market price? We consider it to be the *value*, the rate at which the thing is sold. To make a market, there must be buying and selling, purchase and sale. If the owner of an article holds it at a price which nobody will give for it, can that be said to be its market value? Men sometimes put fantastical prices upon their property. For reasons personal and peculiar, they may rate it much above what any one would give for it. Is that the value? Further, the holders of an article, flour, for instance, under a false rumor, which, if true, would augment its value, may suspend their sales, or put a price upon it, not according to its value in the actual state of the market,

but according to what in their opinion will be its market price or value, provided the rumor shall prove to be true. In such a case, it is clear, that the asking price is not the worth of the thing on the given day, but what it is supposed it will be worth at a future day, if the contingency shall happen which is to give it this additional value. To take such a price as the rule of damages, is to make the defendant pay what in truth never was the value of the article, and to give to the plaintiff a profit by a breach of the contract, which he never would have made by its performance."

The case of suspended sales upon a rumor tending to enhance the price, put by Judge Hopkinson, bears no comparison to the case alleged here, where a combination is intentionally formed to buy up oil, hold it till the year is out, and thus force the market price up purposely to affect existing contracts, and compel the sellers to pay heavy damages for nonfulfilment of their bargains. In the same case, Judge Hopkinson further said: "We did not intend that they (the jury) should go out of the limits of the market price, nor to take as that price whatever the holders of the coffee might choose to ask for it; substituting a fictitious, unreal value, which nobody would give, for that at which the article might be bought or sold." "In determining," says an eminent writer on contracts, "what is the market value of property at any particular time, the jury may sometimes take a wide range; for this is not always ascertainable by precise facts, but must sometimes rest on opinion; and it would seem that neither party ought to gain or lose by a mere fancy price, or an inflated and accidental value, suddenly put in force by some speculative movement, and as suddenly passing away. The question of damages by a market value is peculiarly one for a jury:" Parsons on Contracts, vol. 2, p. 482, ed. 1857. In *Smith* v. *Griffith*, 3 Hill, 337–8, C. J. Nelson said: "I admit that a mere speculating price of the article, got up by the contrivance of a few interested dealers, is not the true test. The law, in regulating the measure of damages, contemplates a range of the entire market, and the average of prices, as thus found, running through a reasonable period of time. Neither a sudden and transient inflation, nor a depression of prices, should control the question. These are often accidental, promoted by interested and illegitimate combinations, for temporary, special and selfish objects, independent of the objects of

lawful commerce; a forced and violent perversion of the laws of trade, not within the contemplation of the regular dealer, and not deserving to be regarded as a proper basis upon which to determine the value, when the fact becomes material in the administration of justice." I may close these sayings of eminent jurists with the language of Chief Justice Gibson, upon stock-jobbing contracts; *Wilson* v. *Davis*, 5 W. & S. 523: "To have stipulated," says he, "for a right to recruit on separate account, would have given to the agreement an appearance of trick, like those of stock-jobbing contracts, to deliver a given number of shares at a certain day, in which the seller's performance has been forestalled by what is called cornering; in other words, buying up all the floating shares in the market. These contracts, like other stock-jobbing transactions, in which parties deal upon honor, are seldom subjected to the test of judicial experiment, but they would necessarily be declared fraudulent."

Without adding more, I think it is conclusively shown that what is called the market price, or the quotations of the articles for a given day, is not always the only evidence of actual value, but that the true value may be drawn from other sources, when it is shown that the price for the particular day had been unnaturally inflated. It remains only to ascertain whether the defendant gave such evidence as to require the court to submit to the jury to ascertain and determine the fair market value of crude oil per gallon, on the 31st of December, 1869, as demanded by the defendant in his fifteenth point. There was evidence from which the jury might have adduced the following facts, viz.: That in the month of October, 1869, a number of persons of large capital, and among them Kirkpatrick & Lyons, combined together to purchase crude oil, and hold it until the close of the year 1869; that these persons were the holders, as purchasers, of a large number of sellers' option contracts, similar to the one in suit; that they bought oil largely, and determined to hold it from the market until the year 1870 before selling; that oil, in consequence of this combination, ran up in price, in the face of an increased supply, until the 31st day of December, 1869, reaching the price of seventeen to eighteen cents per gallon, and then suddenly dropped as soon as the year closed. Major Frew, one of the number says: It was our purpose to take the oil, pay for it, and keep it until January 1st, 1870, otherwise we would have been heading the market on

ourselves. Mr. Long says that on the 3d of January, 1870, he sold oil to Fisher & Brother (the plaintiffs) at thirteen cents a gallon, and could find no other purchaser at that price. Several witnesses, dealers in oil, testified that they knew of no natural cause to create such a rise in price, or to make the difference in price from December to January. It was testified, on the contrary, that the winter production of oil was greater in December, 1869, than in former years by several thousand barrels per day, a fact tending to reduce the price, when not sustained by other means. Mr. Benn says he knew no cause for the sudden fall in price on the 1st of January, 1870, except that the so-called combination ceased to buy at the last of December, 1869.

It was, therefore, a fair question for the jury to determine whether the price which was demanded for oil on the last day of December, 1869, was not a fictitious, unnatural, inflated and temporary price, the result of a combination to "bull the market," as it is termed, and to compel sellers to pay a false and swollen price in order to fulfil their contracts. If so, then such price was not a fair test of the value of the oil, and the jury would be at liberty to determine, from the prices before and after the day, and from other sources of information, the actual market value of the oil on the 31st of December, 1869. Any other cause would be unjust and injurious to fair dealers, and would enable gamblers in the article to avail themselves of their own wrong, and to wrest from honest dealers the fruits of their business. It cannot be possible that a "corner," such as took place a few weeks since in the market for the stock of a western railroad company, where shares, worth in the ordinary market about sixty dollars each, were by the secret operations of two or three large capitalists, forced up in a few days to a price over two hundred dollars a share, can be a lawful measure of damages. Men are not to be stripped of their estates by such cruel and wrongful practices; and courts of justice cannot so wholly ignore justice as to assume such a false standard of compensation. Our views upon the effect of the affidavit of defence, on which the learned judge in a great measure ruled the question of damages, will be expressed in the case of *Kountz* v. *The Citizens' Oil Refining Co.*, in an opinion to be read immediately.

Judgment reversed, and a *venire facias de novo* awarded.

SHARSWOOD and WILLIAMS, JJ., dissented on the question of the measure of damages.

WOOLNER ET AL. v. HILL ET AL.

(93 New York, 576.—1883.)

APPEAL from judgment of General Term of the Superior Court of the city of New York, affirming a judgment in favor of defendants, dismissing the complaint.

Defendants delivered 500 barrels of alcohol to plaintiffs' agents in New York, and received payment therefor. Plaintiffs brought this action to recover damages for failure to deliver 2,500 barrels, pursuant to the following contract:

"NEW YORK, Sept. 19, 1879.

"Sold for account of Messrs. Hill, Cunningham & Co., to Messrs. Woolner Bros.:

"Three thousand (3,000) barrels alcohol in bond at twenty-nine and a half (29½) cents per gallon, cash, in bankable funds, on delivery. Proof 188 per cent, with corresponding reduction in price if it falls below, but not to be lower than 186 per cent. Said alcohol to be a prime and colorless article, and to be delivered in prime shipping order alongside buyers' vessel, at the rate of five hundred barrels per month, from November to April inclusive, sellers' option, free of expense to buyers, provided name of vessel and number of pier are made known before arrival of the goods here.

"Alcohol to be re-gauged here, actual gauges given and charged for as per Custom House gauger's returns.

"Buyers to give export bond as per regulation. Accepted September 19, '79.

"HILL, CUNNINGHAM & CO."

MILLER, J. The most material questions in this case are whether it was the duty of the vendee to inform the vendor of the name of the vessel and at what place the vendee would be ready to receive the alcohol, which the vendor had contracted to deliver, and whether it was necessary for the vendee to tender the price of the alcohol to the vendor before delivery.

By the contract between the parties the alcohol was to be delivered alongside of the buyer's vessel at the rate of five hundred barrels per month from November to April inclusive, sellers' op-

tion, cash on delivery free of expense to buyers, provided name of vessel and number of pier are made known before arrival of the goods. No notice was given by the plaintiffs in accordance with the provisions of the contract, nor was any tender made by them to the defendants of the price of the alcohol. The appellants offered upon the trial to show a waiver by the defendants which would have obviated this objection. The offer made was to the effect that a witness on behalf of the plaintiffs called upon the defendants at their office on the 31st day of December, 1879, and had an interview with one of the defendants; that he said to him he appeared there at the request of Mr. Woolner on behalf of the plaintiffs; that he wanted to know if it was necessary for these people to do anything by way of tender or performance of their contract to keep their contract alive, or to tender the money, or to do anything of that kind, and that Mr. Hill, one of the defendants, said to him that it was not.

It also appears, from the evidence, that on the 15th day of December, 1879, the defendants made a general assignment for the benefit of creditors. It was also proved that on the 31st day of December, 1879, the plaintiffs sent a letter by messenger to the defendants, demanding the delivery of the five hundred barrels of alcohol due that month, and offering to pay the purchase-price of the same on delivery.

We think it was sufficient that the plaintiffs were ready and willing to pay the contract-price of the alcohol when delivered, and no tender was necessary. This rule is well settled in this State. (*Coonley* v. *Anderson*, 1 Hill, 519; *Vail* v. *Rice*, 5 N. Y. 155; *Bronson* v. *Wiman*, 8 id. 188; *Isaacs* v. *New York Plaster Works*, 67 id. 124.)

In this case no tender was required for the additional reason that the defendants had, by their voluntary assignment of the 15th of December, placed it out of their power to perform. The assignee had no power, as such, under the circumstances to accept the tender or fulfill the contract, as the defendants had by the assignment disposed of their interest in the same, and, as there was no one to whom the tender could properly have been made, the plaintiffs were relieved from making any offer of performance by a tender of the money.

The rule is well established that the party who disables himself from performing his contract before default by the other party waives the performance of acts by the latter, which, except

for such disability, he would be bound to perform, as conditions precedent to recovery on the contract. (*Hawley* v. *Keeler*, 53 N. Y. 114.)

Having this principle in view the defendants, by the assignment, had become disabled from performing the contract and waived the conditions which might have been insisted upon had they been in a condition to perform themselves.

The formal demand of the goods by the plaintiffs on the 31st of December, and their offer to pay for the same on delivery, was strong evidence of the plaintiffs' readiness to perform.

The evidence offered by the appellants to show that the defendants had waived tender and any offer of performance from the plaintiffs, we think should have been received. (*Holmes* v. *Holmes*, 9 N. Y. 525; *Smith* v. *Poillon*, 87 id. 594; 41 Am. Rep. 402.) The evidence was admissible for the purpose of showing that the plaintiffs were not bound to tender the money upon the contract for the alcohol, or to designate the place of delivery. Although the complaint averred a readiness to perform on the part of the plaintiffs, yet if the evidence shows that the plaintiffs were ready and willing to perform at the appointed time and place, and the defendants did nothing, this is enough to sustain the averment without providing either a demand or a tender of the money. (*Coonley* v. *Anderson*, 1 Hill, 519, *supra*.) It cannot, therefore, be said that the evidence would have raised a new issue.

The point was not taken on the trial that the plaintiffs were not copartners, and, on the ground stated, the judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

COPLAY IRON CO. v. POPE ET AL.

(108 New York, 232.—1888.)

APPEAL from judgment of the General Term of the Court of Common Pleas of the city of New York, affirming judgment in favor of plaintiff.

EARL, J. We must assume that the sale of iron alleged in the defendants' counter-claim was an executory sale, as that is

the fair and just inference from the facts alleged. The plaintiff was a manufacturer of iron, and the contract of sale was made on the 8th day of December, 1879. It covered nine hundred tons of iron, and it was to be delivered in the future as and when the defendants ordered it to make delivery. There is no allegation that the plaintiff at the time of this sale had the identical nine hundred tons of iron on hand, or that that quantity was separated from other iron. It would be against all experience, and certainly against the usual course of business, to suppose that the manufacturer had the iron on hand, and that upon its purchase by the defendants, it was separated and set apart and stored for them. It is reasonable to suppose, and as all the facts were submitted to the court, neither party asking to have them submitted to the jury, the court had the right to draw the inference that the iron was to be thereafter manufactured, weighed, designated, and delivered; and thus this was an executory contract of sale. In such a case the fact of payment has very little significance. It is sometimes a controlling fact to show that the sale was not executory and was completely executed. It is always evidence upon that question, but in a case like this is not important. The price of property purchased may be paid, and yet the contract of sale in every sense be executory.

Treating this then as an executory contract of sale, the defendants are not in a position to complain of the quality of the iron, because they never offered to return it, and never gave the plaintiff notice or opportunity to take it back. They must therefore be conclusively presumed to have acquiesced in the quality of the iron. (*Hargous* v. *Stone*, 5 N. Y. 73; *Reed* v. *Randall*, 29 id. 358; *McCormick* v. *Sarson*, 45 id. 265; *Dutchess Co.* v. *Harding*, 49 id. 323; *Gaylord Mf'g Co.* v. *Allen*, 53 id. 515.) Here there was no collateral warranty or agreement as to the quality of the iron. The representation as to the kind and quality of iron was part of the contract of sale itself, descriptive simply of the article to be delivered in the future; and clearly within the cases cited an acceptance of the property by the defendants, without any offer to return the same at any time, deprives them of any right to make complaint of its inferior quality.

The judgment should be affirmed with costs. All concur, except ANDREWS, J., not voting.

Judgment affirmed.